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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1092

JOHN DUFF ABERCROMBIE

Petitioner

V.

STATE OF LOUISIANA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered on September 4, 1979.

OPINION BELOW

The opinion of the Supreme Court of Louisiana (Appendix _____, infra, pp _____) is reported at 375 So2d 1170 (La. 1979).

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on September 4, 1979. A timely motion for rehearing was denied on October 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) because petitioner has asserted below and asserts here the deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

I. Whether the evidence presented against the defendant was clearly insufficient to constitute proof of guilt beyond a reasonable doubt as could be found by any rational trier of fact accordingly the conviction of the petitioner violated his rights to due process of law under the 14th Amendment to the U.S. Constitution.

II. Whether the admission of "other crimes' evidence violated Petitioner's rights to a fair trial and due process under the 6th and 14th Amendments to the Constitution of the United States.

III. Whether the distinction made by the Court below between moral and legal wrong as applied to the M'Naughten Rule denied Petitioner his rights to equal protection under the law, since such a distinction has never been drawn before by any other Louisiana Court, nor applied to any other defendant.

IV. Whether allowing the introduction of an inculpatory statement made to parish coroner when no notice was ever given by state to do so, and when no intention to introduce was indicated in the state's answers to motion for discovery, and further, when the statement was made to the coroner, an elected official of the state, without benefit of Miranda warnings, violated the 5th Amendment to the Constitution and due process under the 14th Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 2 and 19 of the Louisiana Constitution of 1974.

2. The statutes cited are 28 U.S.C. 1257; La. R.S. 14:10, 14, 30; La. R.S. 15:438, La. R.S. 33:1554, La. C.Cr.P. Articles 560, 561, and 652.

STATEMENT OF THE CASE

On the night of October 21, 1976, at approximately 10:00 o'clock P.M., Father Ted Lelieveld was shot several times by an unidentified assailant with a .38 caliber weapon at the door to the rectory of Saint Margaret's Church in Homer, Louisiana. He died from the gunshot wounds shortly thereafter. In the next few days some discarded cartridges were found on a street near the Catholic Church and a pistol was found on the side of the road north of town. Attempts to fingerprint the gun to identify the murderer proved unsuccessful. Two vehicles were seen leaving the rectory immediately after the shots were heard. One was a light colored vehicle, the other a dark colored vehicle. Neither vehicle could be specifically described. There was no one who could describe the alleged assailant.

For several months prior to the shooting, there had been acts of vandalism and minor offenses committed against persons working at various Catholic churches and Catholic organizations in the Northwest Louisiana area. The Claiborne Parish Sheriff's office and the Louisiana State Police suspected that the person who had committed those acts might be the person who killed the priest in Homer. Accordingly, they began to interview witnesses to those incidents in an attempt to obtain leads in the murder case.

It should be noted, however, that the type of acts committed prior to the murder were infrequent, of a minor nature such as vandalism and simple assault, and in no way bore any resemblance to the type of crime which was being investigated.

The various law enforcement agencies, using descriptions of vehicles given by witnesses to the various acts of vandalism and a composite sketch prepared during those interviews, together with the fact that upon one occasion the man being sought used the name John, narrowed their investigation down to one residence in the town of Athens where three vehicles

similar to descriptions given were located. There lived petitioner, John Abercrombie with his father, Mr. Mack Abercrombie.

On the evening of October 24, 1976, five officers met at a washateria in Athens, Louisiana, with the intention of going to the Abercrombie residence to make an identification and an arrest. At that time, they knew the vehicles they were looking for were in the yard at the Abercrombie house, that John Abercrombie fit the description of the person they were looking for, and that his first name matched the first name of the person they were looking for. Although they had the intention of entering the Abercrombie house to look for John and to look for evidence of the murder, none of the officers made any attempt whatsoever to obtain a search warrant or a warrant for the arrest of John Abercrombie prior to going on the premises.

When the officers went to the Abercrombie house, several stationed themselves about the yard and three officers approached the house. They knocked on the door and were admitted to the house by Mr. Mack Abercrombie. They informed Mr. Abercrombie that they wanted to talk to John. Mr. Abercrombie indicated to them that John was in his room sick. The officers proceeded to John Abercrombie's room where he was found sick in bed. No officer asked or requested the permission of John Abercrombie to enter either the house or his room, where he was at the time.

Immediately upon entering the room, one officer began reading John Abercrombie his rights and placed him under arrest for the acts of vandalism which had been committed in other parishes. Simultaneously, another officer began a preliminary search.

At this point the officers decided that they did need a search warrant. Two of them returned to Homer, Louisiana, taking with them the evidence seized, and obtained a search warrant to search for evidence of the misdemeanor offenses

committed. During this time, several officers remained at the Abercrombie residence with John physically in their custody and, apparently, continued to conduct a search of the premises.

The search continued until the early morning of October 25, and John Abercrombie was taken to the Homer jail and booked for the misdemeanors and the murder of Father Lelieveld. In the next several days he was interviewed by the Sheriff's office and by the Parish Coroner. During these interviews he made many statements which exhibited the fact he was suffering from paranoid schizophrenia.

As soon as Abercrombie was indicted, counsel was appointed. A Sanity Commission was empaneled to determine if he was able to stand trial. The Sanity Commission, which included the Parish Coroner, unanimously determined that Abercrombie was not able to aid and assist in his own defense. He was placed in the East Louisiana State Hospital at Jackson for treatment. It was well over a year later that Abercrombie was certified able to aid and assist in his own defense.

Prior to the trial, various motions were filed on behalf of the State and the defendant, some of which are the subject of this application as follows:

1. Motion for Bill of Particulars Inspection and Discovery — Answered by the State.
2. Motion for PreTrial Determination of Admissibility (of other offenses) filed by State and objected to by Defendant — Defendant's objection dismissed — evidence allowed.

The trial in this matter was had in October of 1978. As may be seen by the record herein, hundreds of persons had to be interviewed before a jury could be seated.

The primary thrust of the defense of Abercrombie was that of not guilty by reason of insanity.

During the course of the trial, the State spent almost an entire day parading witnesses before the jury, testifying with reference to offenses allegedly committed by Abercrombie in other parishes not of a similar nature to murder, many of which were distant in time from the killing of the priest, all over the objection of counsel, ostensibly for the purpose of showing knowledge, intent, and motive to commit murder. All of the evidence presented against Abercrombie with reference to the murder was of a circumstanial nature.

The defendant presented three psychiatrists with reference to his mental state at the time of the commission of the alleged offense. All three experts, two of whom had interviewed Abercrombie shortly after the incident as members of the Sanity Commission, testified that in their opinion Abercrombie did not understand the nature and quality of his act, if he in fact committed the murder, and could not understand the difference between right and wrong. One psychiatrist from the State Hospital testified that the other five or six psychiatrists on his staff had all reached the same conclusion. At this point in the trial the overwhelming weight of the evidence established the insanity of the defendant pursuant to the M'Naughten rule, and the defendant had carried his burden of proof with reference to an insanity defense as set forth in Louisiana Statutory and jurisprudential law.

On rebuttal, the State presented only the Parish Coroner who was not a trained psychiatrist but who, after considering the same statements and manifestations from which the psychiatrists had reached their ccnclusion, reached the opposite conclusion. However, his testimony on direct and cross-examination was contradictory and conflicting with reference to the key right-wrong questions.

The expertise of the local coroner was challenged by petitioner. At the time the last psychiatrist who testified had

stated, when questioned by the state that the coroner, a general practitioner, was not competent to give expert psychiatric opinions. However, he was allowed to testify and this testimony was the only evidence presented by the state to refute the insanity of petitioner. Likewise, an inculpatory statement made by petitioner to the local coroner was allowed in evidence, despite the fact that the procedural requirements of Miranda were not met as well as Fourteenth Amendment due process requirements. The introduction of this statement was made over the objection of petitioner.

Despite the overwhelming weight of the evidence, the jury from this sparsely populated rural parish, apparently chose to believe the conflicting testimony of their local physician (the coroner) and found petitioner guilty of 1st Degree Murder.

The first degree murder conviction was subsequently appealed to the State Supreme Court where it was upheld. An application for a rehearing was denied.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. The question of whether the evidence presented against petitioner was sufficient to constitute proof of guilt beyond a reasonable doubt as could be found by any rational trier of fact, accordingly the conviction of the petitioner violated his right to due process under the 14th Amendment to the U.S. Constitution, was first raised at the trial Court level by way of Motions for New Trial and Motions in Arrest of Judgment which were overruled by the trial judge. This issue was again raised on appeal before the Supreme Court of Louisiana. The Louisiana Supreme Court after giving brief consideration to the decision in *Jackson v. Virginia*, ____ U.S. ____, 61 L.Ed.2d 560, 99 S.Ct. ____, returned to its practice of upholding the decision of the jury if any evidence at all can be found in the record with

reference to each element of the offense charged without truly weighing that evidence against that presented on behalf of the defendant, and, accordingly sustained the conviction of petitioner.

II. Petitioner's Assignment of Error number three in the Louisiana Supreme Court alleged that the trial court erred in allowing the introduction into evidence of other crimes allegedly committed by petitioner, the effect being to so prejudice the jury as to deprive petitioner of a fair trial and to deny him due process. The Louisiana Supreme Court held the evidence admissible to show motive.

III. The Equal Protection issue in this cause arose when the Louisiana Supreme Court upheld the conviction and sentence of petitioner, despite the overpowering evidence of his inability to distinguish right from wrong, by creating for the first time in Louisiana law, a legal wrong-moral wrong dichotomy under the Louisiana Codification of the M'Naughten Rule and finding that although petitioner didn't know it was morally wrong to kill another human being, he knew it was legally wrong and was therefore culpable.

IV. This issue arose when counsel for the state elicited from the parish coroner an inculpatory statement allegedy made to him by petitioner during an interview. Counsel for petitioner timely objected to allowing such a statement into evidence, which objection was overruled by the trial court.

REASONS FOR GRANTING THE WRIT

I. THE EVIDENCE PRESENTED AGAINST THE DEFENDANT WAS CLEARLY INSUFFICIENT TO CONSTITUTE PROOF OF GUILT BEYOND A REASONABLE DOUBT AS COULD BE FOUND BY ANY RATIONAL TRIER OF FACT AND ACCORDINGLY, THE CONVICTION OF THE PETITIONER VIOLATED HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE U. S. CONSTITUTION.

No better statement of the basis for this application can be found than the dissent of the Honorable Justice John Dixon of the Supreme Court of Louisiana, who succinctly stated:

> "The record is clear that the defendant did not know the difference between right and wrong at the time of the offense. A civilized people should not ascribe legal responsibility to such an insane person even if he kills a Catholic priest. Our law does not permit it. To say the defendant knew it was illegal to kill is to avoid the issue of sanity."

The jurisdiction of this court is based upon the contention by petitioner that his conviction and the review thereof by the Louisiana Supreme Court, which sustained the conviction, violated fundamental due process requirements as set forth in Amendment 14, United States Constitution, Section 1, the guidelines for which were most recently delineated in the case of *Jackson v. Virginia*, ____ U.S. ____ ____, 61L. Ed2d560, 99 S. Ct. ____, 1979.

Petitioner was charged with first degree murder which is defined in the first paragraph of La. R.S. 14:30 as follows:

> "First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm."

In order to carry its burden of proof the State must prove beyond a reasonable doubt that the defendant has specific criminal intent to kill, specific criminal intent being defined at La. R.S. 14:10 (1), as follows:

> "Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act."

To the charge, petitioner entered a dual plea of "not guilty and not guilty by reason of insanity" pursuant to Louisiana Code of Criminal Procedure, Article 561.

Insanity is defined at La. R.S. 14:14 as follows:

> "If the circumstances indicate that because of a mental disease or defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility."

The statutes of our State place the burden of proof with reference to the defense of insanity on the defendant. The burden of proof with reference to this defense is set forth at Louisiana Code of Criminal Procedure, Article 652, as follows, to-wit:

> "The defendant has the burden to establish the defense of insanity at the time of the offense by a preponderance of the evidence."

In the official revision comment under Article 652, the preponderance of the evidence rule is defined as follows:

> "The preponderance of proof is recognized as that of a character to satisfy the mind, though it be not free from reasonable doubt. This preponderating proof is enough in civil cases to authorize a finding in favor of the party. The terms are of constant use in the administration of criminal law."

At the trial, the prosecution presented only circumstantial evidence against petitioner. The burden of proof placed upon the State with reference to use of circumstantial evidence is found at La. R.S. 15:438 and is set forth as follows:

> *"The rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence."* (Italics ours).

The State failed to prove, through the use of circumstantial evidence, a sufficent case to establish that petitioner possessed the necessary knowledge and intent required by Louisiana law in order to convict him of the crime of first degree murder.

While the State failed to carry its burden of proof the evidence adduced with reference to the actions and mental state of petitioner clearly shows by a preponderance of the evidence that he was so afflicted by paranoid schizophrenia that he could not understand the difference between right and wrong at the time the crime was committed, if he did in fact commit the crime.

The evidence shows that petitioner was first diagnosed as being afflicted with paranoid schizophrenia at least a year prior to October 21, 1976, the date of the crime. He had been committed at least twice to mental hospitals in the State of Texas for treatment with reference to this problem. P. 63, 64, 440, 452, 453, 469, 473, 488.

Evidence produced by the State shows that for several months prior to the trial, petitioner is believed to have committed numerous irrational acts against total strangers, a classic characteristic of paranoid schizophrenia. In addition to the irrational acts prior to the crime, the State introduced into evidence several tapes which had ben made by the defendant prior to October 21, 1976. P. 370-384. A reading of the transcript of these tapes can lead to no other conclusion than that petitioner was so possessed by the disease that he could not have possibly understood the difference between right and wrong.

The evidence presented indicated that at the time petitioner was arrested, several days after the crime in October, 1976, he was suffering from delusions caused by the disease. P. 386-387, P. 520-521.

Each member of the Sanity Commission concluded in early December that petitioner was unable to aid and assist in his own defense. P. 6-70.

The opinion of every psychiatrist who examined petitioner was that he was so afflicted by paranoid schizophrenia that he could not understand the difference between right and wrong on October 21, 1976.

Dr. Retius Osborne, head of the Forensic Unit of the East Louisiana State Hospital, who headed a team of psychiatrists and psychologists that worked with petitioner for over a year prior to trial, testified:

At page 237 of the testimony:

"Q Okay, Dr. Osborne in your opinion did Mr. Abercrombie understand the difference between right and wrong if he in fact committed this act of murder?

A In my opinion he did not under the circumstances that I understand existed understand the difference between right and wrong."

Page 238:

"Q However, you do feel that at the time the murder occurred, if Mr. Abercrombie did it, he did not understand that he was doing wrong, is that correct?

A. That's my professional opinion, yes."

At page 240, on cross examination:

"Q Is it a fact that a lot of paranoid schizophrenics can tell the difference between right and wrong?

A The gross and vast majority can indeed.

Q But once again getting back to your opinion, this particular case, this one couldn't?

A Yes sir."

At page 244, on cross examination:

". . . opinion he could understand the nature of the charges against him and that the charges against him and that he was competent to assist counsel in his defense, is that right?

Right and if I may, uh, there was some, of course, inconsistency, we have strong membership in the staff. We also had a uniquely different illness and we had some disagreement. Uh, the nature of the remaining symptoms, uh, split our staff to the extent that, uh, uh, it slowed down a formal decision but as early as of about the fifth month, uh, two of us felt that he could proceed, uh, effectively, others did not and, uh, we began to communicate at that time, yes.

Q Was there any split in any of the opinions of any of the, your staff that looked to him as to whether or not he knew the difference between right and wrong?

A Not to my knowledge, sir. Not to my knowledge, uh, in carefully reviewing the record there were one or two who avoided the question but to my knowledge those who dealt with the question all concurred in his not knowing.

Dr. Charles W. Armistead, one of the three members of the sanity commission, and a practicing psychiatrist since 1957, testified:

At page 283 of the testimony:

Q And so because of that and because of your knowledge of this type of character makeup and everything you concluded that Mr. Abercrombie, if he did it, did know the difference between right and wrong at the time he did it, is that correct?

A That would be my opinion based on his present at the time I saw him and the thoughts that, uh, he undoubtedly was very similar to this, uh, he undoubtedly was very similar to this, uh, a month, uh, or two months previously."

Dr. Kimbell, another member of the sanity commission in private practice since 1948, and a practicing psychiatrist since 1969, testified:

At page 328 and 329 of the testimony:

"Q And when you were reviewing the background and all I believe you said that, uh, you even talked to the deputies about how he had been behaving and had he been behaving like this ever since they'd put him in jail, is that right?

A That's correct.

Q And they, you were informed that he had been like this ever since they'd picked him up, were you not?

A Right. I asked the deputies had he been in this way since he was in jail and they told me yes.

Q So if I told you that that was approximately a week after the priest was shot, would, uh, your opinion be that if he was in that condition a week later that he was more likely than not in that same mental condition at the time on October 21st, 1976?

A I think the man was psychotic. My problem is that the man was psychotic on October the 21st."

At page 330:

MR. BURKE:

"Q If he was in the same condition on October the 21st, same mental condition or state, as he was the day he

was in your office, would it be your opinion then that he could not understand the difference between right and wrong?

WITNESS:

A That's correct."

The testimony of the foregoing three psychiatrists was the evidence presented by the defense, which along with the tapes introduced by the State and the testimony of the state's witnesses on its case in chief presented an overwhelming picture of insanity manifested by a demented hatred for the Catholic Church, communism, and certain agencies of the United States government. It is clear that Abercrombie believed himself to be, alternatively, the Christ Reincarnated and the Archangel Satan.

Petitioner affirmatively carried his burden of proof, under the laws of the State of Louisiana, by a preponderance of the evidence that he was in fact so afflicted by paranoid schizophrenia on October 21, 1976, that he could not possess the necessary intent to be held criminally responsible for the crime with which he is charged.

To counter this overwhelming evidence, the State presented one witness, Dr. Donald Haynes, the Claiborne Parish Coroner, an elected official. In an attempt to lay a predicate to qualify Haynes as an expert, Counsel for the State, on the cross examination of Dr. Richard Kimbell (who had known Haynes for many years and worked with him on numerous sanity commissions) asked at page 321:

"Q So just from your experience you know he is qualified you would think to be on a sanity commission?

A Well I think certainly, uh, he — I don't think he can give expert testimony in the field of psychiatry but I think he, I would certainly value his opinion."

Kimbell further testified about Haynes qualification at page 238:

"Q And would not be qualified as an expert in the psychiatric field, is that correct?

A That's correct."

No evidence was offered by the state to controvert the testimony of Dr. Kimbell with reference to Haynes' lack of qualifications in the field of psychiatry.

Haynes was presented as the *only* rebuttal witness. On cross examination with reference to his qualifications, Haynes testified at page 334:

"A Usually he is one of the physicians appointed to the sanity commission.

Q And, uh, let me ask you this: You're not a psychitrist?

A No."

The District Judge, a fellow elected official, allowed Haynes to testify over objection of counsel for petitioner. His testimony indicated that he found all the symptoms and outward manifestations found by all the psychiatrists and upon which they based their opinion. In fact, a portion of Haynes' report as a member of the Sanity Commission, dated December 22, 1976 (almost two years prior to the trial) stated:

"On questioning him at length and with some difficulty it was obvious that the accused is overtly psychotic and delusional. In his present state of mind I feel that it would be quite difficult for him to consult with his lawyer and be able to assist in his defense. There is also the possibility that a court procedure at this time would cause further deterioration of his mental condition.

It is my opinion, therefore, that he is not competent to stand trial at the present time."

As you might have guessed, despite the foregoing, Haynes testified over the objection of petitioner, that his expert opinion was that petitioner knew the difference between right and wrong. This was the only evidence presented by the State to rebut petitioner's insanity.

The Supreme Court of the State of Louisiana is required to review whether the evidence in a criminal proceeding is sufficient to establish each element of the crime charged not only by Amendment 14 to the United States Constitution but also by Sections 2 and 19 of Article I of the Louisiana Constitution of 1974; App. B.

Improperly applying the "same evidence rule" on appeal, the Supreme Court of Louisiana stated:

"Our jurisprudence has held that the question of legal insanity is for the jury. *State v. Rollins*, 351 So.2d 470 (La. 1977). Additionally, considering the defendant's burden of proving his insanity, we have consistently declined to reverse the trial judge's denial of a new trial sought, even when (as here) there is grave doubt as to the sufficiency of the evidence supporting a jury finding of sanity where the record contains some evidence upon which they might base this finding. *State v. Rollins*, cited above.

In the instant case, the coroner, a general practitioner, testified that the defendant was *not* legally insane — i.e., within the meaning of La. R.S. 14:14, he was *not* "incapable of distinguishing between right and wrong, with reference to the question" because of a mental disease or mental defect." This could be said to constitute *some* evidence as to obviate appellate review by us.

When permitted by the court to testify as an expert (the coroner's qualifications as an expert on mental disease were contested, but we found no error, Assignment 5 in appendix), the coroner admitted that the accused's con-

dition represented a severe form of paranoid schizophrenia, including the symptoms observed by three psychiatrists who similarly testified (such as that he was directed by a higher power to perform the acts he did). Nevertheless, unlike the psychiatrists, he was of the opinion that the mentally ill defendant knew right from wrong, because, for one reason, he knew that killing another human being was illegal."

The basis for the last statement of the Court is not clear, because, on cross examination that question was propounded to Haynes and he stated at page 350:

"Q And, uh, did he indicate to you that he felt that the higher power could order him to do things that would be against the law of everyday man?

A No.

Q You didn't ask him that did you?

A No. uh uh."

Returning to the opinion of the Court:

"This ultimate opinion, a deduction equally open to a layman or to a lawyer arguing the case, was discounted by all three psychiatrists. They were of the unanimous professional opinion that one of the results of the severe paranoid schizophrenia was that the accused, even though knowing it was humanly wrong to kill another human being, felt that obedience to the direction of the higher power absolved the act from moral wrong.

The psychiatrists did admit that the mental condition was subject to remission. However, all three of them (two having been on the sanity commission which examined the defendant shortly after his arrest) were of the firm opinion that the accused was not in a state of remission, but instead very much in the grip of his mental disease at the time of the offense. The psychiatrists likewise admitted that the very great preponder-

ance of people suffering from this disease *did* know the difference between right and wrong, but again all three of them were of the firm opinion that the accused was in that very minute percentage of persons so afflicted who did *not*.

No lay evidence was introduced on the defendant's behalf. The only state evidence concerning his conduct or behavior were the four state witnesses who testified to his irrational acts directed against Catholic personnel and institutions. The investigating police officers did not testify as to his conduct or appearance. However, the state introduced into evidence some tapes made by the defendant prior to his arrest which contain irrational ramblings describing his "programming" by higher beings who controlled him and evidencing his obsessive hatred of Catholicism."

The basis for the statement of the Court with reference to the lack of evidence from the investigating officers with reference to petitioner's "conduct or appearance" at the time of and after his arrest is puzzling. Officer Donald Ceccarelli testified that he talked to the defendant the day after his arrest and that the defendant conversed with him about the programming of his mind by the Catholic Church similar to what the defendant had recorded on tapes and written in letters which were seized subsequent to his arrest (P. 194) Evidence was also presented in Dr. Kimbell's testimony and Haynes' testimony about his behavior from the time of his arrest.

The court attempted to justify its reliance on the testimony of Haynes for some evidence in an unpublished appendix to its opinion, as follows:

"A more troublesome issue is presented as to the qualifications of the coroner, a general practitioner, introduced in rebuttal after three psychiatrists (two of them members of the sanity commission) unanimously testified as to their opinion of the accused's legal insanity — that he was so affected by severe paranoid schizophrenia

that he could not understand the difference between right and wrong at the time of the crime.

We are unable to say that the trial judge abused his discretion in permitting the coroner to testify as a medical expert as to the accused's mental condition. See, e.g., State v. Gray, 351 So.2d 448, 459 (La. 1977)). Therefore, this assignment of error is without reversible merit.

Nevertheless, we are frank to state that, in view of the complex and severe nature of the accused's mental condition, the matter is not entirely free from doubt. One of the defense psychiatrists who testified, for instance, was of opinion that the coroner, Dr. Haynes — although a doctor of "unusual ability" and with "some additional training and certainly a good bit of experience" — simply was not qualified to "give expert opinion in the field of psychiatry, although the specialist "would certainly value his (the coroner's) opinion." Tr. 513.[1]

Footnote 1:

We note, however, that there was no substantial disagreement between the psychiatrists' and the coroner's diagnosis of the accused's mental condition and its effects of depriving him of control of his owu acts. The difference in opinion resulted solely from the differing application of the legal (rather than medical) definitions of the "right-wrong" test. See assignment 7 in published opinion."

The insanity of John Duff Abercrombie is uncontroverted. That fact is acknowledged not only by the psychiatrists who testified that he was unable to distinguish right from wrong, but also by the coroner of Claiborne Parish, who, while testifying that he believed petitioner knew right from wrong, admitted that he was suffering from a severe form of paranoid schizophrenia. These doctors, three of whom were members of the original sanity commission which initially agreed that petitioner was unable to stand trial because of his mental condition, were in agreement that at the time of the commission of the offense,

petitioner was suffering from a serious mental disorder, a disorder marked by delusions and irrational behavior.

The Court admits that "the evidence overwhelmingly supports a determination that, due to the accused's paranoid schizophrenia, he was irresistibly compelled to accept the perceived direction of the higher beings whom he felt controlled him, by reason of which he did not know that it was morally wrong to kill the victim." However, the decision finds that petitioner did know that it was humanly wrong i.e. illegal to kill another human being, (from what source is anyone's guess), and therefore he should be responsible for his actions. Our criminal code codifying the M'Naughten Rule nowhere makes this distinction between moral wrong and human wrong, and neither do the official comments under that code article. Neither has any appellate court in Louisiana prior to this decision made such a distinction.

Finally, all the doctors who testified as to the sanity of petitioner based their opinions in large part on interviews they conducted with him. The three psychiatrists who qualified as experts for the defense stated that in their opinion petitioner at the time of the commission of the crime did not *know right from wrong*, thereby bringing him within the parameters of the M'Naughten Rule. Dr. Haynes, a general practitioner, was the only physician holding a contrary view, and his opinion was based solely on inferences drawn from certain acts of the perpetrator of the crime; i.e. disposing of murder weapon and committing the offense at night, although at *no time* did Dr. Haynes ever ask the defendant whether or not he knew it was legally wrong to kill another human being. Other than the few aforementioned tenuous inferences Dr. Haynes drew, there is no evidence that he in fact did know it was legally wrong to do so, if he did indeed commit the crime with which he was charged.

If John Duff Abercrombie cannot be absolved of crim-

inal responsibility for his acts under the present state of our law, then no man could be, not even McNaughten.

All of the evidence presented by the State with reference to the guilt of petitioner was of a highly circumstantial nature.

When raised, the issue of whether circumstantial evidence excludes every reasonable hypothesis presents a matter of law upon which this court can pass. As stated in *State v. Schwander*, 345 So.2d 1173 at page 1175:

> "A trial jury's inference that an accused aided and abetted in a crime cannot be "mere speculation based upon guilt by association." *State v. Williams*, 310 So.2d 513, 515 (La. 1975). The issue of whether circumstantial evidence excludes every reasonable hypothesis of innocence, as required by La. R.S. 15:438, presents a reviewable issue of law. *State v. Pryor*, 306 So.2d 675 (La. (1975) and decisions therein cited. See also *State v. Elzie*, 343 So.2d 712 (La. 1977)."

The primary thrust of the prosecution was to prove criminal intent necessary to commit the crime of first degree murder through the use of circumstantial evidence. In order to do so the State was required to present such circumstantial evidence as *to exclude every other reasonable hypothesis of innocence*. (Italics ours.) The evidence itself was overwhelming that petitioner was afflicted by paranoid schizophrenia and could not understand the difference between right and wrong. Accordingly, the State's circumstantial evidence, as a matter of law, did not exclude every reasonable hypothesis of innocence. Conversely, the evidence presented was overwhelming with reference to the defendant's insantiy. Thus, as a matter of law, the defendant affirmatively carried his burden of proof under Article 652.

In its majority opinion, the Court cited among others, the case of *State v. Johanson*, La., 332 So.2d 275 (La. 1976), in support for its opinion. In the Johanson case, the Court set

forth the rule with reference to the rule of law in our state at Page 272, as follows:

> "To establish a defense on the ground of insanity, it must clearly be proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."

The record reflects that Dr. Retus Osborn, affirmatively testified at page 424 of the transcript that the mental condition of petitioner affirmatively met the M'Naughten rule and that in his opinion the defendant did not know the difference between right and wrong according to the M'Naughten rule further in his testimony.

The Court after reviewing all of the expert testimony has now chosen to make a distinction which did not previously exist in the law of this State, namely, that there is from this point forward to be a distinction between legal insanity and moral insanity. This dichotomy did not exist in the jurisprudence or statutory law at the time of the trial, nor at the time he was examined by the sanity commission. No attempt was made in the direct examination of any of the expert witnesses to make this distinction. In fact, Dr. Osborn was not even asked the question as to whether he had made a determination that the defendant may have known what he was accused of doing was illegal. This question was asked of the other psychiatrists and of the State's rebuttal witness, Dr. Haynes. In reply thereto, Dr. Armistead testified that he did not ask Mr. Abercrombie if he knew that killing another person was legally or humanly wrong; nor did Dr. Haynes.

It was the intention when examining the expert witnesses with reference to the mental condition of defendant, to ask them questions in light of statutory requirements and cur-

rent jurisprudence. The replies of all physicians were given in the same vein. Although there was extensive testimony about the nature of paranoid schizophrenia and the accompanying irresistible impulses that may drive persons who have contracted such a mental disease, all of the psychiatrists concluded that Abercrombie did not understand the nature and quality of his act and did not know the difference between right and wrong if he, in fact, killed the priest.

There is no basis in fact in the record of these proceedings to conclude that the defendant knew that it was legally wrong to kill another person, if for no other reason, simply because none of the physicians who examined the defendant ever sought to make such determniation and the question was not even asked of defendant.

This Honorable Court has stated in *Jackson v. Virginia*, supra, at page 572 and 573 of Lawyers Edition 2d:

> [9, 10, 11a, 12a] The Winship doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the fact finder will rationally apply that standard to the facts in evidence, "A "reasonable doubt," at a minimum, is one based upon "reason".[9] Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as jury. In a federal trial, such an occurrence has traditionally been deemed to require reversal of conviction. Glasser v United States, 315 US 60, 80, 86 L Ed 680, 62 S. Ct. 457; Bronston v. United States, 409 US 352, 34 L Ed 2d 568, 93 S Ct 595. See also, e.g., Curley v United States, 160 F2d 229, 323-233.[10] Under Winship, which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, *it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand.*

> [15, 16a, 17, 18a] *After Winship the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilty beyond a reasonable doubt.*[11] But this inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." Woodby v. INS, 385 US 276, 282, 17 L Ed 2d 362, 87 S Ct 483. *Instead the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, (any rational trier of fact) could have found the essential elements of the crime beyond a reasonable doubt.* See Johnson v. Louisiana, 406 US 356, 362, 32 L Ed 2d 152, 92 S Ct 1620.

At page 547:

> *But it could not seriously be argued that such a "modicum of evidence could by itself rationally support a conviction beyond a reasonable doubt.* The Thompson doctrine simply fails to supply a workable or even a predictable standard for determining whether the due process command of Winship has been honored.[14]
>
> *Under the Winship decision, it is clear that a state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim.*

The Louisiana Supreme Court stated with reference to *Jackson*:

> "*Jackson* seems to hold that the reviewing court must "determine whether the record evidence could reasonably support a finding of guilty beyond a reasonable doubt." 99 S. Ct. 2789. The test mandated is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found

. . . beyond a reasonable doubt "that the defendant is guilty. 99 S. Ct. 2789

Applying this test, we have little difficulty in finding that the evidence overwhelmingly supports a determination that, due to the accused's severe paranoid schizophrenia, he was irresistibly compelled to accept the preceived direction of the higher beings whom he felt controlled him, by reason of which he did not know that it was *morally* wrong to kill the victim.

Reviewing the evidence presented in terms of procedural due process, we find:

A. The State's burden on its case in chief was through circumstantial evidence to prove every element of the crime of first degree murder, including specific intent, to the exclusion of every reasonable hypothesis of innocence, beyond a reasonable doubt.

   The state failed in carrying its burden with reference to intent and the stated defense of insanity because it introduced in it case in chief much lay testimony which highlighted petitioner's insanity through actions and words and it introduced the tapes made by defendant which further highlighted the severity of his mental disease.

B. The defendant's burden, was to prove that he lacked specific intent to commit murder "because of a mental disease or defect the offender was incapable of distinguishing between right and wrong" (La. R.S. 14:14), "by a preponderance of proof . . . of a character to satisfy the mind, though it not be free from reasonable doubt.

   There can be no doubt that petitioner carried this burden of proof.

C. On rebuttal, the burden shifted back to the state to refute the insanity of petitioner beyond a reasonable doubt with evidence sufficient to outweigh the preponderance of the evidence presented by petitioner with evidence sufficient to exclude every reasonable hypothesis of innocence.

   This, the state failed to do, even giving the coroner the benefit of doubt with reference to his qualifications and viewing his conflicting testimony in the light most favorable to the prosecution. The record is clear that the rebuttal testimony does not refute the insanity of petitioner beyond a reasonable doubt, and, in fact, basically supports the defense of insanity.

It is respectfully submitted that a rational trier of fact presented with the evidence herein would be compelled to conclude that the record is devoid of evidence sufficient to find the essential element of specific intent because of the overwhelming evidence of the petitioner's insanity. A rational trier of fact would be compelled by due process requirements to find the petitioner not guilty by reason of insanity.

II. THE ADMISSION OF "OTHER CRIMES" EVIDENCE VIOLATED PETITIONER'S RIGHTS TO A FAIR TRIAL AND DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Prior to the trial, counsel for the State filed a motion requesting that the State be allowed to introduce at trial, evidence of the commission of other crimes which the State contended were admissible under La. R.S. 15:445, La. R.S. 15:446, and *State v. Prieur*, 277 So. 2d 126 (1978), P. 95, 96. These other crimes consisted of acts of simple battery and criminal damage to property allegedly attributed to the petitioner. The State contended that evidence of these other offenses was admissible in order to prove that the petitioner possessed knowledge, intent, and motive to commit the murder for which he was being tried.

Counsel for petitioner filed a written objection to the State's motion, a hearing was had and the trial judge ruled that the evidence would be admissible, to which ruling counsel for petitioner objected.

During the course of the trial, the State presented five different witnesses with reference to other offenses. At the beginning of the testimony of each, counsel for the defense objected, the objection being based upon the written objection previously filed. In each instance, the trial judge overruled the objection and allowed the witnesses to testify.

The first to testify was Father Vincent Elson, who gave testimony with reference to an incident which occurred at his church in Ruston, Louisiana, on August 14, 1976, approximately two and one-half months before the murder for which the petitioner was being tried.

The incident described by Father Elson was that of a young man coming to the door of the rectory and hitting him in the face with his fist. He further testified that the young man, after having retreated some distance, threw a brick toward the doorway of the rectory where he stood. There were no statements made and he saw the young man leave in a light green vehicle.

Father Elson further testified that he had been called upon later in an effort to identify the petitioner, John Abercrombie, as being the man who hit him. He testified that the strongest statement he could make with reference to identifying his assailant was that he believed Abercrombie was the man that did it.

The state then called Mrs. Pat Wagner to the stand. Her testimony was with reference to two incidents which occurred at her place of employment, a center for Catholic Family Services in Shreveport, Louisiana, on July 7, 1976, and September 22, 1976, both incidents far removed in point of time from the murder for which petitioner was being tried.

In the first incident, Mrs. Wagner was hit on the hand by a man who she identified as John Abercrombie, on July 7, 1976. No weapon was used and no word was spoken indicating what the intent of the assailant might have been.

In the second incident, on September 22, no attack was actually made upon Mrs. Wagner, and again no word was spoken indicating what the intention of the man might have been.

Mrs. Ruth Dow Johnston, another employee of the Catholic Family Services Center was also called. She testified with reference to an incident that occurred on September 7, in which a man who she identified as Abercrombie came to the Family Services Center in Shreveport, Louisiana, inquiring about her boss. When the man discovered that her boss was not there he simply left, leaving a message that John was here. No assault or any other type of offense was committed on that date.

The second incident which Mrs. Johnston testified about occurred on September 22. Her testimony was simply given to corroborate the testimony of Mrs. Wagner with reference to what occurred at that time.

After Mrs. Wagner had testified, the State next called Father Daniel M. Walsh, the Catholic priest in Minden, Louisiana. The apparent purpose of calling Father Walsh was to testify with reference to a man who had come to his church on several occasions prior to the murder of Father Ted Lelieveld. The man had discussions with Father Walsh about ill feelings toward the Catholic Church, which discussions made Father Walsh feel uneasy and afraid according to his testimony. This individual did not commit any crime in the presence of Father Walsh and did not make any threats toward him or any threats to kill or injure anyone. In fact, Father Walsh could not even identify petitioner as being the man with whom he had had these discussions.

The State also called as a witness Mrs. Robert DeLoach, who along with her husband operates an Exxon Station across the street from the Catholic Church in Homer, Louisiana. The purpose of Mrs. DeLoach's testimony was to show that she had

seen a large man on a motorcycle go into and come out of St. Margaret's Church on the date that vandalism at that church was discovered. Mrs. DeLoach could not identify the man and did not see him commit any crime, particularly one of a violent nature against another human being.

On appeal, the State Supreme Court held that evidence of these other crimes was not admissible to show knowledge or intent.

> "As the defendant correctly contends, these decisions indicate that evidence of these other crimes was not properly admitted to show knowledge or intent. *Knowledge* was not an issue because the defendant did not attempt to give an innocent explanation for apparently unlawful conduct. See State v. Frederick, 340 So. 2d 1353, 1355 (La. 1976); State v. Slayton, 358, So. 2d 694, 697-98 (La. 1976); State v. Johnson, 228 La. 317, 82 So. 2d 24 (1955). (Italics ours.)
>
> *Intent* was also not a 'real and genuine issue', State v. Moore, 278 So. 2d 781, 785 (La. 1973), because the defendant contended that he had not done the act at all, not that he had not had the requisite intent. State v. Frederick, 340 So. 2d 1353, 1355 (La. 1976). 'Where the requisite intent is an inescapable conclusion from the act, it is uniformly held that other crimes evidence is inadmissible.' Comment, cited above, at 33 La. L. Rev. 617-18. The defendant was not, for instance, claiming that he pulled the trigger by accident or mistake, or with only intent to frighten, so as to make intent a genuine issue. (Italics ours.)
>
> To the extent that the defendant's specific intent was put at issue by his plea of not guilty by reason of insanity, the commission of these other crimes was not relevant on the issue of legal insanity — to show that the defendant knew the difference between right and wrong, La. R.S. 14:14. In support of the State's case against legal insanity, the defendant was not shown to have known the difference between right and wrong

> when he committed these other crimes (in fact, the indication is that his behavior was irrational) — that he committed these other crimes was simply not relevant to prove that, if he shot the priest, he did so with any knowledge that it was wrong."

However, the State Supreme Court did hold that the evidence of the other crimes was relevant to show motive, which they held to be "an independent basis of relevancy", citing McCormick for that proposition. Likewise, the Court cited *State v. Sutfield*, 354 So. 2d 1334 (La. 1978) for the proposition that evidence of other crimes is admissible if the evidence is relevant to show motive. However, it is important to note that in Sutfield, the conviction was overturned because of reversible error arising out of the use of other crimes evidence used to show motive. The opinion cites *no other case* for the proposition that evidence of other crimes may be used to show *motive*. Louisiana's statutory rule of evidence which is the foundation for the use of other crimes evidence says absolutely nothing about motive. It reads in full:

> "When knowledge or intent forms an essential part of the inquiry, testimony may be offered of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent and where the offense is one of a system, evidence is admissible to prove the continuity of the offense, and the commission of similar offenses for the purpose of showing guilty knowledge and intent, but not to prove the offense charged. LSA-R.S. 15:446."

Such a statutory rule of evidence should be construed strictly against the state. According to the clear meaning of this statute, the use of other crimes can be used only to show knowledge and inent. If the crime is one of a system, evidence can be used to show continuity of the offense and the commission of similar offenses, but again, only for the purposes of showing guilty knowledge and intent, purposes which the State Supreme

Court held were not served by the introduction of other crimes evidence in this particular case.

To allow the use of other crimes evidence in this case contrary to the provisions of the above mentioned statute is to deny petitioner due process in direct violation of the 14th Amendment to the U. S. Constitution and his right to a fair trial under the Sixth Amendment.

To allow other crimes evidence to show motive in this particular case, when such evidence has never been allowed before in a Louisiana Court is to deny petitioner equal protection of the laws, in violation of the Fourteenth Amendment to the U. S. Constitution.

III. THE DISTINCTION MADE BY THE COURT BELOW BETWEEN MORAL WRONG AND LEGAL WRONG AS APPLIED TO THE M'NAUGHTEN RULE DENIED PETITIONER HIS RIGHTS TO EQUAL PROTECTION UNDER THE LAW, SINCE SUCH A DISTINCTION HAS NEVER BEEN DRAWN BEFORE BY ANY OTHER LOUISIANA COURT, NOR APPLIED TO ANY OTHER DEFENDANT.

Louisiana's statutory rendition of the famous M'Naughten rule is found at La. R.S. 14:14 and reads as follows:

> "If the circumstances indicate that because of a mental disease or mental defect the offender was *incapable* of *distinguishing between right and wrong* with reference to the conduct in question the offender *shall* be exempt from criminal responsibility". (Italics ours.)

This particular codification makes absolutely no distinction between *legal wrong* and *moral wrong*. Neither do the official comments make such a distinction. However, the La. Supreme Court did make such a distinction in its opinion.

> ". . . we have little difficulty in finding that the evidence overwhelmingly supports a determination that,

> due to the accused's severe paranoid schizophrenia, he was irresistibly compelled to accept the perceived direction of the higher beings whom he felt controlled him, by reason of which he did not know that it was *morally* wrong to kill the victim.
>
> "On the other hand, the expert evidence also admitted that the accused knew it was 'humanly wrong', being illegal to kill another human being."

This distinction was made for the first time by the Supreme Court in this case. Louisiana's codification of the M'Naughten rule makes no such distinction, the official comments make no such distinction, and no other Court in Louisiana has ever made such a distinction. The author of the State Supreme Court's opinion, the Honorable Justice Albert Tate, sought to rationalize the use of the moral wrong-legal wrong dichotomy by writing:

> "The jury is thus free to exculpate for legal insanity on either basis, providing that the inability to know is a product of a mental disease or defect.
>
> "As we apprehend our Louisiana jurisprudence, we have followed the latter practice in the application of the 'right-wrong" test of La. R.S. 14:14."

Yet, Mr. Justice Tate cites no cases in support of his contention that Louisiana jurisprudence has made any distinction between moral wrong and legal wrong in its application of the M'Naughten Rule. Instead he launches into a discussion of Louisiana's rejection of the "irresistible impulse" test:

> "Therefore, we have not disturbed jury findings of sanity when the instructions to the Jury have permitted it to find the accused sane if the accused knows it is 'wrong' to commit the offense, without specifying that he must know it is *either* 'legally' or 'morally' wrong. That is, we have not as a matter of law required that there be exculpation by reason of legal insanity where the accused does not know his act is *morally* wrong be-

cause of 'irresistible impulse' or some variation of this concept. State v. Johanson, 332 So. 2d 275 (La., 1976); State v. Berry, 324 So. 2d 822 (La. 1976); State v. Plaisance, 210 So. 2d 323 (La. 1968); State v. Bickham, 121 So. 2d 207 (La. 1960); State v. Jenkins, 107 So.2d 632 (1958)."

Justice Tate, through astute semantical maneuvering, seeks to equate the "irresistible impulse" doctrine with a situation where the accused, because of his mental disease or defect, does not know the difference between right and wrong *morally*, but does know that his act is *legally* wrong. He cites several cases where Louisiana courts have rejected the "irresistible impulse" doctrine and concludes, therefore, that under Louisiana law a person who knows that his act is legally wrong can be held accountable even though his disease prevents him from knowing his act is morally wrong. These cases are the entire foundation for that proposition. It is a house built upon a foundation of straw. Irresistible impulse is not a cognitive test. It fits nowhere under the standard M'Naughten "right-wrong" test. The ability to distinguish right from wrong, either *legally or morally*, is not at issue in the irresistible impulse criteria. "Irresistible impulse" is met when a defendant, although appreciating the difference between right and wrong, is unable, because of his disease, to exercise self-control over his actions, his freedom of will having been destroyed. Its adoption is a dramatic change in the law under a system employing the standard "right-wrong" M'Naughten test. Petitioner never once raised the issue of irresistible impulse. Never once did petitioner seek to make any change in the existing law. All three psychiatrists who testified, stated that in their opinion, petitioner did not know right from wrong under the standard M'Naughten test. Dr. Haynes, a general practitioner who testified for the State, was the sole exception, stating that he did think the defendant knew right from wrong, even though he believed he suffered from a severe form of paranoid schizo-

phrenia accompanied by delusions. This evidence was sufficient to convince the State Supreme Court, ostensibly applying the standard of review required by *Jackson v. Virginia* (61 L.Ed. 2d 560, 99 S. Ct.____, 1979), that petitioner did not know that the act he committed, if, in fact, he did commit it, was morally wrong. But then, the Court stated that in its mind, the evidence showed that petitioner did know it was legally wrong to commit the crime in question, and, therefore, he could be held accountable for his actions despite his uncontroverted insanity. Again, this distinction was made by a Louisiana Court for the *first time* in this case. The Court's discussion of irresistible impulse is irrelevant, and has no place in laying a precedent for this kind of distinction. There simply is no precedent for it, neither in the applicable statute nor the Louisiana jurisprudence. The Court made no reference to it in a subsequent case involving many of the same questions (see Poree). The distinction has been applied once, and only once, years after the codification and judicial interpretation of the M'Naughten rule in the Louisiana law. Applied in a case laden with religious undertones and potential religious prejudice; given the large Catholic population of the State and great number of Catholics on the State's elected Supreme Court. Applied to the alleged slayer of a Catholic priest by the Louisiana State Supreme Court, one of whose justices remarked when these questions were being argued before him, "I don't care what anyone says, this guy is crazy as a June Bug" — a Justice who nevertheless concurred in the result. Applied in such a manner as to violate the Equal Protection Clause of the U. S. Constitution.

IV. ALLOWING THE INTRODUCTION OF AN INCULPATORY STATEMENT MADE TO PARISH CORONER WHEN NO NOTICE WAS EVER GIVEN BY THE STATE TO DO SO, AND WHEN NO INTENTION TO INTRODUCE WAS INDICATED IN THE STATE'S ANSWERS TO MOTION FOR DISCOVERY, AND FURTHER, WHEN THE STATEMENT WAS MADE TO THE

CORONER, AN ELECTED OFFICIAL OF THE STATE, WITHOUT BENEFIT OF MIRANDA WARNINGS, VIOLATED THE FIFTH AMENDMENT TO THE CONSTITUTION AND DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

Prior to the trial of this matter, Petitioner filed a motion for Bill of Particulars, Inspection, and Discovery. Questions 10 and 11 of that motion read as follows:

> 10. Has the defendant allegedly made to any officer, employee of the State of Louisiana, or any other person, any oral statement of confession, either of an inculpatory or exculpatory nature, with reference to the offense charged? If yes, on what date and at what time was said statement made and to whom was said statement allegedly made?
>
> 11. Does the State of Louisiana have knowledge of any oral statement which the State intends to offer in evidence made by the defendant, whether before or after arrest, in response to interrogation by any person who is a law enforcement officer or employed by any law enforcement agency?

In response to these questions, the State replied in its answer to the motion:

> 10. "The State is not aware, at this time, of any oral statements or confessions made by defendant with reference to the offense charged."
>
> 11. "The State does not have knowledge of any oral statements made by the defendant in response to interrogation by any law enforcement officer which the State intends to offer in evidence at the trial of this matter."

No notice was ever given petitioner that the State intended to introduce any inculpatory statements made by petitioner.

However, during the trial the State called Dr. Donald Haynes to the stand and sought to qualify him as an expert witness in order to ask him his opinion as to the mental state of

petitioner. During the questioning, the State asked questions of Haynes which were not phrased in hypothetical form. The Court excused the jury and proceeded to warn the Stat about phrasing its questions in other than hypothetical form. At page 340:

> "THE COURT: All right. Now that the jury is removed the thing that I was having a problem with, uh, I realize that certain psychiatrists have testified that, and have all but assumed before the jury that this man did it. I'm just—I think as counsel for the State, all I'm saying as counsel we probably should be careful how you phrase your questions to Dr. Haynes. Dr. Haynes may know more about the case than the jury knows. I just, uh, I don't know how — do you understand what I am trying to say?
>
> MR. QUINLAN: I think so, judge. The question that I asked, you know, I didn't put together in the question that he, in fact, committed the crime but my question . . .
>
> THE COURT: . . . Well, you are questioning him along the lines you had the facts of the case and I think Dr. Haynes may not have realized, of course, the jury's got to decide that issue also. This is all that I am saying. I think be a little more particular on the and that's what I meant by in the hypothetical situation and also Dr. Haynes, of course, the *jury itself must determine whether this man in fact did commit it* and in giving your answers you probably can keep that in mind a little more. The other witnesses were the defendant's witnesses and I think it's a difference maybe in, uh . . .
>
> MR. QUINLAN: Well, Judge—let me say it this a way: Assuming, uh . . .
>
> THE COURT: *All you have to do is frame it in a hypothetical sense* without letting the jury believe that you —the last question asked was to me a conclusion that the man had done it. You see." (Italics ours.)

During the following testimony of Dr. Haynes, the State initially sought to phrase each question in the form of a hypothetical question consistent with the above admonition of the Court. Any questions outside the area in which the doctor had been qualified as an expert were timely objected to. At Page 344:

"A DR. HAYNES: Uh, in the first place when I, when I interviewed him and after my interviews on both occasions it was my opinion that he was mentally ill. There was no doubt in my mind about it that he did suffer from a psychosis that he was mentally ill but I did feel that he knew right from wrong and I base this partially on some of the things I asked him but also on the fact that he, uh, came at night, or the assailant came, apparently at night and left the scene of the accident, disposed of the bullets and gun and so forth and I think that someone who did not know it was wrong would not have, uh, been eager to do this sort of thing in that manner.

Q So in the question that I gave you, you would feel that individual did know the difference between right and wrong?

A Yes, I do.

Q Also this is another hypothetical question: If would you feel, you know, if a person felt that — *he was asked a question like, do you think it's wrong to kill another human being and the answer to that question was, uh, it's against the law and then, you know, he was asked, well, even if you were programmed to do so, and his answer was, it'd still be against the law, would that tend to lead you to believe that that person knew it was wrong to kill somebody else?* (Italics ours.)

A Yes.

MR. BURKE: If it please the Court, I'm going to object to that, too, because I do feel that that is going beyond the, uh, area in which the doctor has been accepted as an expert by the Court.

THE COURT: Objection will be overruled."

Finally, the State abandoned any attempts at disguising its questions in the form of hypothetical inquiries, clearly contrary to the above mentioned admonition of the Court. At page 345:

MR. QUINLAN:

"Q *Doctor in your interview with this defendant the question and answer and question and answer that I just hypothetically posed to you, did that in fact happen?* (Italics ours.)

A *Yes, it did.*

MR. BURKE: Objection, your Honor.
THE COURT: What is the basis of your objection?
MR. BURKE: I don't think that, uh, the doctor, I don't think it's appropriate for the doctor to attempt to *give any information that he obtained from his interviewing him which is specifically what was requested.* He's been qualified as an expert and the Court is allowing him to answer a hypothetical situations." (Italics ours.)

By disregarding the trial judge's admonition to ask questions phrased in hypothetical form only, the State was able to bring out that petitioner allegedly stated to the local coroner, in response to the question whether or not it was wrong to kill another human being, that it is against the law. And secondly, that even if a person were programmed to kill, it would still be

against the law. The State asked the coroner if he did *in fact* ask those questions, and Haynes replied that he did and that Petitioner answered in the manner described above. Such statements by petitioner were surely inculpatory, since the jury, if they accepted the circumstantial evidence linking petitioner to the killing of the victim, would be compelled to find that petitioner did it, *knowing it was legally wrong*. To allow the introduction of such an inculpatory statement is clearly in violation of due process, since the State never put petitioner on notice that it did intend to introduce such statements and since the State's intention to do so was never revealed to petitioner through its answers to the questions propounded in the Motion for Discovery.

Two footnotes to this argument seem appropriate. If petitioner did, in fact, answer the questions put to him by the local coroner in the manner indicated, it would not be conclusive of his ability to know whether or not the killing was legally wrong. Each expert witness, including Dr. Haynes, testified that petitioner was subject to lucid intervals. The initial interview conducted by Haynes occurred almost one week after the date of the murder, so that the response of petitioner may have been made during a lucid interval and might have been totally different from what his response would have been had he been asked the same question immediately following the murder.

A second footnote to this argument concerns whether or not Dr. Haynes actually asked the questions he testified he asked. The testimony printed above indicated that he asked petitioner would it be wrong to kill someone, and secondly, would it be wrong even if higher forces compelled him. Yet at page 350 of the transcript, Dr. Haynes testified as follows:

"Q And, uh, did he indicate to you that he felt that the higher power could order him to do things that would be against the law of everyday man?

A No.

Q You didn't ask him that, did you?

A No, uh uh."

So at one point Haynes testified that he asked petitioner would it be wrong to kill if a higher power ordered it done and petitioner was alleged to have answered that it would still be illegal. Yet, the above testimony, taken on indirect examination, indicates that the coroner never asked petitioner whether or not it would be wrong if a higher power ordered him to kill someone.

Dr. Haynes asked the questions at issue here and received the inculpatory answers in his capacity as Parish coroner; i. e., as a law enforcement officer of the State. Under La. R.S. 33:1554, the Parish coroner is described as a conservator of the peace. Under Louisiana law, if there is a vacancy in the office of sheriff, the coroner acts for and in the place of the sheriff. Op. Atty. Gen. 1948-50, p. 682. He is, in short, a peace officer of the State. Haynes interviewed Abercrombie in that capacity one day after he was arrested. The interview occurred in the Parish jail. No evidence was ever presented that petitioner's rights were read to him prior to that interview. It is from that interview that Haynes made up his mind that Petitioner knew it was legally wrong to kill another human being. It is that inculpatory statement that the State elicited from Dr. Haynes in the above described testimony. Even if Dr. Haynes was not a peace officer under Louisiana law, he was clearly acting as an agent for the police, having been called by the sheriff's department to interview petitioner. Again, no notice was ever given that the State intended to use this inculpatory statement. Furthermore, even if Miranda warnings were given, they were given to a man who, because of his deteriorated mental condition, could not fully appreciate them — a man who, in Dr. Haynes words, ". . . was so overtly psychotic as to be unable to

assist in his own defense". To allow such an inculpatory statement into evidence, over the objection of defense counsel, violates the fifth amendment protection against self-incrimination. To allow its introduction without prior notice of the State's intention to do so and without disclosing their intention to do so in their answers to the Motion for Discovery, is to violate procedural due process under the 14th amendment of the U. S. Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

M. CARL RICE
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ATTORNEYS FOR PETITIONER.

CERTIFICATE OF SERVICE

I, M. Carl Rice, hereby certify that I am a member of the bar of the Supreme Court of the United States and that I have served copies of the Petition for Writ of Certiorari in the above captioned case on counsel for respondent by depositing same in the United States mail, first class certified mail, postage prepaid, addressed as follows:

Honorable Patrick Quinlan
Assistant Attorney General
1885 Wooddale Boulevard (Suite 1010)
Baton Rouge, Louisiana 70806

The party required to be served has been served. Done this 3rd day of January, 1980.

Attorney for Petitioner

APPENDIX A

SUPREME COURT OF LOUISIANA

NO. 64,185

STATE OF LOUISIANA,

Appellee

versus

JOHN DUFF ABERCROMBIE,

Appellant

APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT, CLAIBORNE PARISH; HONORABLE DAVID T. CALDWELL, DISTRICT JUDGE, PRESIDING

* * *

TATE, Justice.

The defendant was convicted of first degree murder and was sentenced to life imprisonment. La. R.S. 14:30 (1976); La.C.Cr.P. arts. 905-905.9. On appeal defendant relies on eight assignments of error.

Assignments of Error Nos. 3 and 7 present serious issues which concern (a) the admission of evidence concerning other crimes allegedly committed by the defendant and (b) legal insanity. We find no reversible merit to them or to the remaining assignments. We therefore affirm.

Context Facts

On the night of October 21, 1976, Father Ted Lelieveld, a Catholic priest, was shot twice in the chest when he answered

a knock at his front door. He died shortly thereafter.

There were no eyewitnesses to the shooting. The following day a .38 caliber pistol was found near the scene of the crime, but the police still had no suspects. They concentrated on investigating several anti-Catholic incidents that had occurred in the surrounding area during the four preceding months.

A composite sketch was obtained from several witnesses to these prior acts of vandalism, assault, and battery. This composite reminded two policemen of a man they had stopped some weeks earlier. As a result the police visited the home of the defendant, where they saw three vehicles that matched descriptions given by the witnesses of the several prior incidents.

The police were admitted by the defendant's father. When they saw that the defendant matched the composite sketch, he was arrested for the prior acts of battery, assault, and criminal damage to property.

During the arrest the officers seized a box of .38 caliber shells and a cigarette pack with four .38 caliber shells. After obtaining a search warrant and searching further, some letters and tapes evidencing a strong antagonism towards the Catholic church were also seized.

Several days later the defendant was indicted for the first degree murder of Father Lelieveld.

The defendant was initially determined by a sanity commission to be incapable of standing trial. Eventually, however, he was found to be competent to stand trial, and he pleaded not guilty and not guilty by reason of insanity.

His motion for a change of venue and his motion to suppress the evidence seized at the time of his arrest were both denied. The trial court overruled the defendant's objection to a state pre-trial *Prieur* motion to permit the admission of evidence concerning the prior acts of vandalism and potential violence.

At his trial the gun, the bullets, the letters and tapes, and the other crimes evidence were all introduced. Other than cross-examination, the only evidence introduced by the defense was psychiatric testimony to the effect that if he had committed the crime he could not tell right from wrong. On rebuttal, the local coroner testified that he thought the defendant had known right from wrong.

The jury returned a verdict of guilty. After a sentencing hearing, the defendant was sentenced to life imprisonment.

Assignment 3 ("Other-crime evidence)

The defendant assigns as error the admission of testimony concerning several acts of vandalism and assault and battery that the defendant allegedly committed against the Catholic church and its personnel during the four months preceding Father Lelieveld's death. Although we do not find merit to the assignment, it presents an aspect of other-crime evidence not previously considered in depth by us.

At a pre-trial hearing to determine the admissibility of these other crimes, the state argued that they were admissible to show intent, knowledge and motive. The trial judge ruled that the evidence was admissible.

The evidence of these other crimes, a simple battery and criminal damage to property, a simple battery and assault, and a criminal damage to property, was presented through the testimony of four witnesses (in a total of 39 pages of testimony included in a transcript of 332 pages of trial testimony):

(1) Father Vincent Elson of Ruston testified that he had been punched in the face by a man he had never seen before when he answered a knock at the front door of his rectory on Saturday, August 14, 1976, about two and one-half months before the present offense. He further testified that the man had thrown a brick at his head from halfway down the walkway.

Father Elson identified the defendant in court as the man who had punched him, and he also testified to an out-of-court photographic identification that he had made of the defendant. He described his assailant's vehicle as a green truck with a black stripe, a description which matched one of the vehicles found at the defendant's residence.

Mrs. Pat Wagner and Mrs. Ruth Dowden Johnston testified concerning some incidents which had occurred at their place of employment, Catholic Family Services, in Shreveport.

(2) Mrs. Wagner testified that a man had come into her office and slammed his fist on her hand on July 7, 1976, about four months before the offense. The man had not said a word and had driven away in a white older model car. The same man had appeared again on September 22, 1976, a month before the offense, and he had slapped the window of her office when he was unable to come in. This time he had driven away on a motorcycle. The descriptions of the two vehicles were consistent with the two vehicles (in addition to the truck observed by Father Elson) that were found at the defendant's residence.

Mrs. Wagner testified that she had assisted a police sketch artist in making a sketch. She identified the defendant in court as the man she had seen on these two prior occasions.

(3) Mrs. Johnston corroborated Mrs. Wagner's testimony concerning the man's attempt to get into the office on September 22, 1976; she also testified that on September 7, 1976, two weeks earlier, the same man had asked to see the "head honcho" and, upon being told that her boss was not there, had left a message "that *John* had been there and he had proven what needed to be proven." ("John" is the defendant's first name.) Mrs. Johnston had also helped the police sketch artist. She, like Mrs. Wagner, had seen the motorcycle and the white car. She likewide identified the defendant in court.

(4) Mrs. Robert DeLoach testified that she had seen a large man on a motorcycle standing in front of St. Margaret's Church, the victim's church, on October 7, 1976. Later it was discovered that some leaves of the church bible had been torn and the crucifix had been disturbed. Mrs. DeLoach was unable to identify either the defendant or the man she had seen at the church.

The state must prove beyond a reasonable doubt that an accused is guilty of the crime with which he is charged. La. Const. of 1974, Art. 1, Section 16. Therefore, proof of present guilt may not properly be made by evidence of general bad character or of different prior criminal acts. State v. Frederick, 340 So.2d 1353 (La. 1976).

When evidence of other crimes is admitted there is a risk that the defendant will be convicted because he had been shown to be a bad man rather than because there has been proof beyond a reasonable doubt that he committed the crime for which he is being tried. As Wigmore says:

"* * * The natural and inevitable tendency of the tribual — whether judge or jury — is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge. * * *" 1 Wigmore, Evidence, Section 194 (3rd Ed.).

In State v. Prieur, 277 So.2d 126 (La. 1973), this court recognized that "[t]he admissibility of other acts of misconduct involves substantial risk of grave prejudice to a defendant," and consequently "[e]vidence of crimes related to the offense with which a defendant is charged is inadmissible except under special exceptions." 277 So.2d 128. See McCormick on Evidence, Section 190 (2d ed. 1972).

According to McCormick, evidence of other crimes cannot be admitted unless the evidence is relevant for some purpose other than that of showing that the defendant is probably guilty because he is a man of criminal character. McCormick, Evidence, Section 190 at 447 (2d ed. 1972). See State v. Sutfield, 354 So.2d 1334, 1336 (La. 1978). See also Wigmore on Evidence, Sections 55, 57, 194 (3d ed. 1940); Comment, Other Crimes Evidence in Louisiana, 33 La. L. Rev. 614, 615 (1973); Comment, Admissibility of Prior Criminal Acts as Substantive Evidence in Criminal Prosecutions, 36 Tenn. L. Rev. 515, 575 (1969).

In State v. Prieur, cited above, and its progeny, we have extensively delineated the scope of the three relevant statutory purposes for which other crimes evidence may be introduced. These three purposes are those set forth by the legislature in La. R.S. 15:445, 446 — to prove knowledge, intent, and system. (However, we have also had occasion to note other bases of independent relevancy, such as motive. State v. Sutfield, 354 So.2d 1334, 1336-37 (La. 1978).)

The state argues that the evidence at issue here was relevant for three purposes —to prove knowledge, to prove intent, and to prove motive. The former two, knowledge and intent, are covered by La. R.S. 15:445-446 and are governed by the rules that have been laid down in our extensive jurisprudence following *Prieur*.

As the defendant correctly contends, these decisions indicate that evidence of these other crimes was not properly admitted to show knowledge or intent. Knowledge was not an issue because the defendant did not attempt to give an innocent explanation for apparently unlawful conduct. See State v. Frederick, 340 So.2d 1353, 1355 (La. 1976); State v. Slayton, 358 So.2d 694, 697-98 (La. 1976); State v. Johnson, 228 La. 317, 82 So.2d 24 (1955).

Intent was also not a "real and genuine issue", State v. Moore, 278 So.2d 781, 785 (La. 1973), because defendant contended that he had not done the act at all, not that he had not had the requisite intent. State v. Frederick, 340 So.2d 1353, 1355 (La. 1976). "[W]here the requisite intent is an inescapable conclusion from the act, it is uniformly held that other crimes evidence is inadmissible." Comment, cited above, at 33 La. L. Rev. 617-18. The defendant was not, for instance, claiming that he pulled the trigger by accident or mistake, or with only the intent to frighten, so as to make intent a genuine issue.

Even if intent had been a serious issue, the commission of a simple battery, an assault, and criminal damage to property were not relevant to show that the defendant had the specific intent to kill or inflict great bodily harm. State v. Slayton, 338 So.2d 694, 697 (La. 1976).

To the extent that the defendant's specific intent was put at issue by his plea of not guilty by reason of insanity, the commission of these other crimes was not relevant on the issue of legal insanity — to show that the defendant knew the difference between right and wrong, La. R.S. 14:14. In support of the state's case against legal insanity, the defendant was not shown to have known the difference between right and wrong when he committed these other crimes (in fact, the indication is that his behavior was irrational) — that he committed these other crimes was simply not relevant to prove that, if he shot the priest, he did so with any knowledge that it was wrong.

However, in addition to knowledge and intent, the state argues that testimony concerning these other crimes was admissible to prove motive. "While intent and motive are frequently regarded as one and the same thing, there is a clear distinction between them. Motive is the cause or reason that moves the will and induces action for a definite result, while intent is the purpose to use a particular means to effect such result." Comment, Admissibility of Prior Criminal Acts as Substantive Evidence in Criminal Prosecutions, 36 Tenn. L. Rev. 515, 518 (1969).

In State v. Sutfield, 354 So.2d 1334, 1336-37 (La. 1978), we recognized that evidence of other crimes may be admissible if the evidence is relevant to show motive, i.e., to show that the defendant had a reason to commit the crime he is charged with. Motive is generally recognized as an independent basis of relevancy. See McCormick, Evidence, Section 190 at 450-54 (2d ed. 1972); 2 Weinstein and Berger, Weinstein's Evidence, Section 404[09] at 404-53 (1979); Comment, Other Crimes Evidence in Louisiana, 33 La. L. Rev. 614, 617 (1973).

Nevertheless, "in order to have independent relevance, the motive established by the other crimes must be more than a general one, such as gaining wealth, which could be the underlying basis for almost any crime; it must be a motive factually peculiar to the victim and the charged crime." State v. Sutfield, cited above, 354 So.2d at 1337.

In addition, as with all evidence of other crimes that is independently relevant, other crimes evidence admitted to show motive must satisfy two tests: 1) there must be clear and convincing evidence that the defendant did indeed commit the other crimes, and 2) the probative value of the evidence must outweigh the risk of prejudice — the risk that the evidence will be used to convict the defendant because he is a man with a criminal disposition. State v. Sutfield, cited above, 354 So.2d at 1337. See McCormick, Section 190 at 452-54; Weinstein and Berger, Section 404[10] at 404-66.

The existence of these two additional tests is necessitated by the rationale behind the general prohibition against evidence of other crimes, the fear that a defendant may be convicted because of a criminal disposition rather than actual guilt. In order to minimize the risk of prejudice, it must be clear (a)

that the defendant committed the other crimes and (b) that their probative value exceeds the risk of prejudice to the defendant.

Applying the above principles, we hold that the testimony of Father Elson (1), Mrs. Wagner (2), and Mrs. Johnson (3), was properly admissible to prove motive. The defendant was charged with an apparently senseless killing, so any evidence tending to prove that the defendant had a motive or reason for committing this crime was extremely probative.

The defendant's actions in attacking Father Elson, slapping Mrs. Wagner's hand, attempting to get into Mrs. Wagner's office, and leaving the cryptic message with Mrs. Johnson tended to prove that the defendant had a strong hatred for the Catholic church. This hatred gave the defendant a factually particular motive to attack a Catholic priest. The defendant's behavior illustrated a particular feeling against a small particular group, Catholic employees.

Since the evidence tended to prove a factually particular motive of great probative value in this case, the issue becomes whether the defendant's connexity with these other crimes was adequately established and whether the evidence's risk of prejudice outweighed its probative value.

In order to admit other crimes evidence, clear and convincing evidence must show that the defendant indeed committed the other crimes. State v. Sutfield, cited above, 354 So.2d at 1337. See McCormick, Section 190 at 451-52, Comment, Other Crimes Evidence in Louisiana, 33 La. L. Rev. 614, 620 (1973).

Because of the lack of a clear and convincing connexity with the defendant, the testimony of Mrs. DeLoach (4) was improperly admitted. She was completely unable to identify the man she saw as the defendant, and therefore this evidence should have been excluded. However, the other three witnesses,

Father Elson (1), Mrs. Wagner (2), and Mrs. Johnston (3), were able to identify unequivocably the defendant as the man they had seen. Therefore, their testimony was admissible, unless its probativeness was outweighed by the risk of prejudice.

In balancing probativeness versus prejudice it is important to remember the reason for the rule; it is designed to prevent the jury from improperly convicting the defendant simply because he is a bad man or has committed other crimes. In the instant case, a first-degree murder trial, there was very little risk that the jury's objectivity would be swayed by evidence that the defendant had punched someone and thrown a brick at him and that he had hit someone's hand and slapped a window.

Certainly, some risk of prejudice resulted from these minor criminal episodes evidencing the defendant's strong anti-Catholicism. Nevertheless, this relatively slight risk of prejudice was outweighed by the probativeness of the evidence to the proof of the defendant's guilt of the act. Nor are we unmindful that proof of these acts was to some extent supportive of the accused's principal defense, that he was legally insane because of a paranoid schizophernic condition.

We conclude, therefore, that the evidence of these last three witnesses was properly admitted to prove motive through these relatively minor crimes proceeding from an irrational hatred of Catholicism.

Although Mrs. DeLoach's, (4)'s, four pages of testimony should not have been admitted, we concluded that its admission does not constitute reversible error. As discussed above, the offender's minor vandalism at the church was not of a nature that would inflame a jury to the point that it would be influenced to convict an accused of first degree murder. In addition, the jury would most probably give it little weight, since Mrs. DeLoach's own testimony indicates the tenuous connection

of the conduct of the defendant. In fact, the defendant's attorney did not even cross-examine the witness.

In summary, we conclude that all of the evidence of other crimes was properly admitted except the testimony of Mrs. DeLoach, but that the admission of her testimony, although erroneous, did not constitute reversible error.

The defendant additionally argues that the testimony of a fifth witness, Father Walsh of Minden, was improperly admitted as "other-crime" evidence. However, unlike the other four witnesses, Father Walsh did not implicate the defendant in any criminal activity whatsoever. He testified only that a man came into or to his church three times and on one occasion launched into a tirade against the Catholic church. Since this testimony did not concern any crime committed by the defendant, the argument that it should have been excluded (based solely on the other-crimes objection) is without merit.

Accordingly, we find no reversible merit to this assignment.

Assignment 7 (Motions for a New Trial — Evidence Of Legal Sanity?)

The motions for a new trial principally urge that the evidence does not support the conviction, arguing that the overwhelming preponderance of the evidence supports an acquittal by reason of insanity.

Our jurisprudence has held that the question of legal insanity is for the jury. State v. Rollins, 351 So.2d 470 (La. 1977). Additionally, considering the defendant's burden of proving his insanity, we have consistently declined to reverse the trial judge's denial of a new trial sought, even when (as here) there is grave doubt as to the sufficiency of the evidence supporting a jury finding of sanity, where the record contains

some evidence upon which they might base this finding. State v. Rollins, cited above.

In the instant case, the coroner, a general practitioner, testified that the defendant was *not* legally insane — i.e., within the meaning of La. R.S. 14:14, he was *not* "incapable of distinguishing between right and wrong, with reference to the in question" "because of a mental disease or mental defect." This could be said to constitute *some* evidence so as to obviate appellate review by us.

When permitted by the court to testify as an expert (the coroner's qualifications as an expert on mental disease were contested, but we found no error, Assignment 5 in appendix), the coroner admitted that the accused's condition represented a severe form of paranoid schizophrenia, including the symptoms observed by three psychiatrists who similarly testified (such as that he was directed by a higher power to perform the acts he did). Nevertheless, unlike the psychiatrists, he was of the opinion that the mentally ill defendant knew right from wrong, because, for one reason, he knew that killing another human being was illegal.

This ultimate opinion, a deduction equally open to a layman arguing the case, was discounted by all three psychiatrists. They were of the unanimous professional opinion that one of the results of the severe paranoid schizophrenia was that the accused, even though knowing it was humanly wrong to kill another human being, felt that obedience to the direction of the higher power absolved the act from moral wrong.

The psychiatrists did admit that the mental condition was subject to remission. However, all three of them (two having been on the sanity commission which examined the defendant shortly after his arrest) were of the firm opinion that the accused was not in a state of remission, but instead very much in the grip of his mental disease at the time of the offense. The

psychiatrists likewise admitted that the very great preponderance of people suffering from this disease *did* know the difference between right and wrong, but again all three of them were of the firm opinion that the accused was in that very minute percentage of persons so afflicted who did *not*.

No lay evidence was introduced on the defendant's behalf. The only state evidence concerning his conduct or behavior were the four state witnesses who testified to his irrational acts directed against Catholic personnel and institutions. The investigating police officers did not testify as to his conduct or appearance. However, the state introduced into evidence some tapes made by the defendant prior to his arrest which contain irrational ramblings describing his "programming' by higher beings who controlled him and evidencing his obsessive hatred of Catholicism.

We have discussed the evidence in this detail because the United States Supreme Court, in Jackson v. Virginia, ___ U.S. ___, 98 S.Ct. 2781 (1979), seems to hold that federal due process mandates a broader standard of review of the sufficiency of the evidence to support a conviction than the "some evidence" rule. (We have discussed *Jackson* more fully in State v. Mathews, ___ So.2d ___ (Docket No. 64,079, this date rendered).)

Jackson seems to hold that the reviewing court must "determine whether the record evidence could reasonably support a finding of guilty beyond a reasonable doublt." 99 S.Ct. 2789. The test mandated is "whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found . . . beyond a reasonable doubt" that the defendant is guilty. 99 S.Ct. 2789.

Applying this test, we have little difficulty in finding that the evidence overwhelmingly supports a determination that, due to the accused's severe paranoid schizophrenia, he was

irresistibly compelled to accept the perceived direction of the higher beings whom he felt controlled him, by reason of which he did not know that it was *morally* wrong to kill the victim.

On the other hand, the expert evidence also admitted that the accused knew it was "*humanly* wrong", being illegal, to kill another human being.

The difficulty is that the M'Naughten test of *legal* insanity, i.e., being capable of distinguishing between right and wrong with regard to the conduct in question, is not in origin or application a medical or scientific concept.[1] The testimony and opinion of medical experts are almost essential for determining whether a mental disease or defect affected the defendant's conduct, and they also have weight in the decision whether *because* of this mental condition (as required) the accused could not distinguish between "right" and "wrong".

However, in the last analysis, it is rather a question of law than of medicine as to what the cognizable "wrong" is; a legal rather than a medical question is presented by the issue of whether an accused is legally insane who knows it is *legally* wrong to kill another human being, but who does not know it is *morally* wrong (being under a delusion or compulsion produced by severe mental disease). Indeed, the predominant practice in American jurisdictions seems without discussion to leave it to the factual determination of the trial jury to determine whether the defendant was capable of knowing right from "wrong" with regard to the conduct complained of, without specifying as a matter of law whether the defendant must know it to be "moral-

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Footnote 1:

See full discussion of M'Naughten rule at LaFave and Scott, Criminal Law 274-86 (1972), which includes criticisms and a full discussion of, for instance: whether the accused is excused if he knew it was legally wrong but thought he was morally right; the "irresistible impulse" theory of legal insanity; the entire subject of delusions, which historically gave birth to the M'Nauhgten rule.

ly" or instead "legally" wrong. LaFave and Scott, Criminal Law 278-279 (1972). The jury is thus free to exculpate for legal insanity on either basis, providing that the inability to know is a product of a mental disease or defect.

As we apprehend our Louisiana jurisprudence, we have followed the latter practice in the application of the "right-wrong" test of La. R.S. 14:14. Therefore, we have not disturbed jury findings of sanity when the instructions to the jury have permitted it to find the accused sane if the accused knows it is "wrong" to commit the offense, without specifying that he must know it is *either* "legally" or "morally" wrong. That is, we have not as a matter of law required that there be exculpation by reason of legal insanity where the accused does not know his act is *morally* wrong because of "irresistible impulse" or some variation of this concept. State v. Johanson, 332 So.2d 275 (La. 1976); State v. Berry, 324 So.2d 822 (La. 1976); State v. Plaisance, 210 So.2d 323 (La. 1968); State v. Bickham, 121 So.2d 207 (La. 1960); State v. Jenkins, 107 So.2d 632 (1958). As these decisions illustrate, we have until now noted the strong arguments against the restricted standard of legal insanity thus represented, but have preferred to leave to legislative revision any clarification or improvement of the statutory test and the jurisprudential interpretation by this court.

We therefore do not find merit to this assignment.

Other Assignments

The other assignments present substantial issues. However, they concern application of accepted legal principles to the particular facts of the present case, of interest only to the parties before us. We have discussed and rejected these assignments in an appendix to this opinion, which will not be published but which will remain part of the public records of this co[illegible]

Decree

For the reasons assigned, we affirm the conviction and sentence.

AFFIRMED.

Appendix

In our published opinion we have disposed of the defendant's Assignments of Error Nos. 3 and 7, as presenting issues of general interest. The other assignments of error (1, 2, 4, 5, 6, and 8) are well-argued and present (except for assignment 8) substantial issues in the context of the facts of this case. Nevertheless, we do not find reversible merit to them:

Assignment 1 (Venue)

The defendant alleges that the trial court erred in denying his motion for a change of venue. A hearing was held and the trial judge ruled that defendant had not carried his burden of showing that he would not be able to obtain a fair and impartial trial in Claiborne Parish.

A defendant is guaranteed an impartial jury and a fair trial. To accomplish this end, the law provides for a change of venue when a defendant demonstrates his inability to obtain an impartial jury or fair trial at the place of original venue. State v. Bell, 315 So.2d 307 (La. 1975).

Grounds for a motion for a change of venue are provided in La.C.Cr.P. art. 622. Under this article, to be entitled to a change of venue the defendant must prove that there is such prejudice in the collective mind of the community that a fair trial is impossible. State v. Smith, 340 So.2d 222 (La. 1976); State v. Clark, 340 So.2d 208 (La. 1976). Whether the defendant has made the requisite showing is a question addressed to the trial court's sound discretion, which will not be disturbed on review in the absence of an affirmative showing of error

and abuse of discretion. State v. Matthews, 354 So.2d 552 (La. 1978).

A number of factors must be considered in determining whether to change venue. As this court stated in State v. Bell, at 315 So.2d 311: "Some relevant factors in determining whether to change venue are (1) the nature of pre-trial publicity and the particular degree to which it has circulated in the community, (2) the connection of government officials with the release of the publicity, (3) the length of time between the dissemination of the publicity and the trial, (4) the severity and notoriety of the offense, (5) the area from which the jury is to be drawn, (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant, and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire."

Other factors that this court has indicated are pertinent to such an inquiry include: (1) the degree to which the publicity has circulated in the areas to which venue could be changed, (2) the care exercised and the ease encountered in the selection of the jury, (3) the familiarity with the publicity complained of and its resultant effect, if any, upon the prospective jurors or the trial jurors, and (4) the peremptory challenges and challenges for cause exercised by the defendant in the selection of a jury. See: State v. Berry, 329 So.2d 728 (La. 1976).

In reviewing the denial of a motion for a change of venue, we examined the evidence adduced at the hearing on the motion for a change of venue and the testimony of prospective jurors on voir dire against the particular factors enumerated above in considering whether the defendant has affirmatively demonstrated an abuse of discretion in the trial court's ruling denying the requested venue change. State v. Bell, 346 So.2d 1090 (La. 1977).

"Article 622 . . . requires more than mere knowledge by the public of the facts surrounding the offense. It requires, in addition, proof of such prejudice in the public mind that a fair and impartial trial cannot be obtained in the parish." State v. Berry, 329 So.2d 728, 730 (La. 1976) (citations omitted). The trial judge ruled that the defendant had not carried this burden. Having reviewed the evidence, we cannot say that the trial judge abused his discretion.

The majority of the media coverage took place at the time the crime was committed, two years prior to the trial. Prior to the defendant's arrest there was speculation that some anti-Catholic psychopath might be responsible for the priest's death. Once the defendant was arrested the reports still referred to the prior acts of vandalism, but they were factual rather than inflammatory.

The defendant was indicted one week after the murder, and after another week the coverage had almost completely ended. There was very little subsequent publicity — a few articles mentioned that the defendant would not be able to stand trial, and there was some mention of him when his trial date was set. Other than the period immediately following the crime and preceding the defendant's arrest, the coverage was almost completely factual and non-inflammatory.

In ruling on the pre-trial motion to change venue the judge stated that he thought that the defendant had failed to prove that he could not get a fair trial in Claiborne Parish because of the pre-trial publicity.

The defendant further argues, however, that the trial court's error in denying his motion to change the venue is indicated by the number of prospective jurors it was necessary to call to complete the voir dire and select a panel. The difficulty encountered in picking an impartial jury is indeed one of the factors to be considered in determining whether venue should

have been changed, although it must be considered together with the care exercised in doing so, and the several other facts involving public prejudice and knowledge of the accused's connection with the crime. State v. Bell, 346 So.2d 1090 (La. 1977); State v. Berry, 329 So.2d 728 (La. 1976).

It is true that 275 prospective jurors were summoned. However, 175 of these were tales jurors, and consequently a high percentage of these prospective jurors were not served or were not statutorily qualified. In addition, numerous jurors were excused for personal hardships, without objection.

At the voir dire, the trial judge allowed extensive questioning, and he was liberal in dismissing prospective jurors for cause upon challenge for the defendant. He was extremely careful and solicitous in his effort to assure a fair and impartial jury. For instance, on his own motion (without objection) he excused nine jurors because they knew the victim, had friends who knew the victim, or knew the defendant or his family; he also excused by his own motion (without objection) four people because they had some fixed opinion which might prevent them from fairly evaluating the evidence.

Many prospective jurors testified that they had heard about the crime, but most stated that they had not formed an opinion or at least had not gained any strong impression. There were only nineteen challenges granted for cause, thirteen by the state (nine of them because the veniremen expressed conscientious scruples against infliction of the death penalty) and only six by the defendant, and no complaint is made as to the trial court's ruling on challenges for cause. In fact, the defendant was required to exercise only six peremptory challenges out of the twelve permitted to him, while the state exercised eleven.

We therefore find no merit to the defendant's contention that the combination of the notoriety of the offense, the

small population of the area, and the victim's influence in the community prevented the defendant from having a fair trial. In view of the length of time between the bulk of the publicity and the trial, the responses on voir dire, and the fact that the defendant's attorney was required to exercise only half of his peremptory challenges, we conclude that the trial judge did not abuse his discretion and that this assignment is without merit.

Assignment 2 (Motion to Suppress)

The defendant alleges that the trial court erred in denying his motion to suppress evidence that was allegedly unlawfully seized. The defendant makes a forceful argument, based on decisions which have questioned the constitutionality of a warrantless arrest and any subsequent search where the arrest is made at the defendant's home without exigent circumstances. See State v. Smith, 352 So.2d 216 (La. 1977); State v. Ranker, 343 So.2d 189 (La. 1977).

We do not reach this issue because the evidence adduced at trial indicates that the officers were admitted to the defendant's house and the defendant's room with the consent of the defendant's father. Since the officers entered with consent and had probable cause to arrest the accused for battery, assault, and criminal damage to property (the other offenses) the arrest was lawful. Since the search that took place was limited to the area within the immediate control of the defendant, it was a valid search incident to a lawful arrest. Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034 (1969); State v. Robinson, 342 So.2d 183 (La. 1977).

Consequently, this assignment of error is without merit.

Assignments 4 and 5 (Qualifications of expert witnesses)

The defendant urges that the trial judge improperly qualified Raymond Cooper as an expert on firearm identifica-

tion and improperly qualified Dr. Donald K. Haynes, the local coroner, as an expert on the mental condition of the defendant.

La. R.S. 15:466 requires the competency of an expert to be established to the satisfaction of the court in the light of the expert's knowledge of the subject about which he is called upon to express an opinion. The competency of an expert witness is a question of fact to be determined within the sound discretion of the trial judge, and his ruling will not be disturbed in the absence of manifest error. State v. Huckaby, 368 So.2d 1059, 1063 (La. 1979); State v. Sepulvado, 359 So.2d 137, 140 (La. 1978).

The trial court was clearly correct in accepting Cooper's qualifications as a firearms expert, in view of his extensive experience and training over six years; in fact, this witness, an employee at the northeast Louisiana Crime Laboratory, had (according to the testimony) been so qualified in 35-40 cases in five different jurisdictions.

A more troublesome issue is presented as to the qualifications of the coroner, a general practitioner, introduced in rebuttal after three psychiatrists (two of them members of the sanity commission) unanimously testified as to their opinion of the accused's legal insanity — that he was so affected by severe paranoid schizophrenia that he could not understand the difference between right and wrong at the time of the crime.

The coroner admitted that he was not a psychiatrist, although in medical school he had received the same classroom training in psychiatry that psychiatrists receive before their further specialized experience and had had about thirty hours of post-graduate training in psychiatry every three years. In his practice, he had treated people with severe emotional problems and, as a result of being coroner, had evaluated persons referred to him for hospitalization for a mental condition, in addition to serving on about a dozen sanity commissions.

We are unable to say that the trial judge abused his discretion in permitting the coroner to testify as a medical expert as to the accused's mental condition. See, e.g., State v. Gray, 351 So.2d 448, 459 (La. 1977). Therefore, this assignment of error is without reversible merit.

Nevertheless, we are frank to state that, in view of the complex and severe nature of the accused's mental condition, the matter is not entirely free from doubt. One of the defense psychiatrists who testified, for intance, was of the opinion that the coroner, Dr. Haynes — although a doctor of "unusual ability" and with "some additional training and certainly a good bit of experience" — simply was not qualified to "give expert opinion in the field of psychiatry," although the specialist "would certainly value his [the coroner's] opinion." Tr. 513.[1]

Assignment 6 (Improperly prejudicial closing argument)

The defendant argues that the trial court erred in denying his motion for mistrial after the prosecutor made prejudicially improper remarks in closing argument.

We do not find merit to the argument that two of the comments complained of represented improper statements of the prosecutor's personal belief in the defendant's guilt. State v. Kaufman, 304 So.2d 300 (La. 1974). They were, rather, permissible comments on inferences based entirely on evidence adduced at the trial. State v. May, 339 So.2d 764 (La. 1976).

Footnote 1:

We note, however, that there was no substanial disagreement between the psychiatrists' and the coroner's diagnosis of the accused's mental condition and its effects of depriving him of control of his own acts. The difference in opinion resulted solely from the differing application of the legal (rather than medical) definitions of the "right-wrong" test. See Assignment 7 in published opinion.

The other two comments, suggesting that a federal or appellate court might release the accused from a mental hospital, verged (although accurate) on an improper appeal to local prejudice (e.g., "some federal district judge who has never been to Claiborne Parish"). Somewhat in mitigation, the comments were made in response to the defense argument that, if committed to a mental institution (the chief plea of the defense), the accused could be released only after one of the locally elected judges decided to order it.

Before this reviewing court will set aside a verdict on the basis of improper argument, it must be convinced that the remarks influenced the jury and contributed to the verdict. State v. Collins, 359 So.2d 174 (La. 1978); State v. Lockett, 322 So.2d 443 (La. 1976). Due to the closeness of the issue as to whether the defendant was not guilty by reason of insanity, we would hesitate to say that, if improper, the comments did not contribute to the jury verdict.

Ultimately, we conclude that the comments are of borderline propriety, as countering the defendant's more subtle appeal to feeling of locality (confidence in their locally elected judges). They are thus possibly justifiable, but certainly not reversible, as provoked by opposing counsel. State v. Lockett, 332 So.2d 443 (La. 1976).

We therefore find no reversible merit to this assignment.

Assignment 8 (Motion in Arrest of Judgment)

The motion in arrest of judgment and some of the allegations in the motions for a new trial attack the sufficiency of the indictment and the procedures of this prosecution. The thrust of the attack is the lack of an aggravating circumstance, cf. La.C.Cr.P. art. 905.4, for a first-degree murder, La. R.S. 14:30 (1976), indictment or conviction, as allegedly required by State v. Payton, 361 So.2d 866 (La. 1978).

Pretermitting other reasons for rejecting this contention, the *Payton* ruling was based upon an amendment to La. R.S. 14:30.1 (1976) by Act 121 of 1977.

The present offense was committed on October 21, 1976, *prior* to this amendment. The present indictment and prosecution were properly instituted and conducted in accordance with the substantive law in effect at the time of the offense, La. R.S. 14:30, 30.1, as enacted by act 657 of 1976, effective October 1, 1976.

The assignment has no merit.

SUPREME COURT OF LOUISIANA

NO. 64,185

STATE OF LOUISIANA

Versus

JOHN DUFF ABERCROMBIE

DIXON, Justice (dissenting)

I repectfully dissent.

The record is clear that defendant did not know the difference between right and wrong at the time of the offense. A civilized people should not ascribe legal responsibility to such an insane person even if he kills a Catholic priest. Our law does not permit it. To say the defendant knew it was illegal to kill is to avoid the issue of sanity.

SUPREME COURT OF LOUISIANA

NO. 64,185

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JOHN DUFF ABERCROMBIE

BLANCHE, J. (concurring in result only)

Evidence of the defendant's mental ability to distinguish right from wrong with reference to his conduct was presented to the jury. That the jury chose to believe testimony favorable to a finding of sanity and mental responsibility was within their discretion and based upon evidence which they apparently regarded as more credible.

The standard (*McNaughton*) chosen by our legislature R.S. 14:14, would prohibit exculpation if one kills knowing it is legally wrong to kill even though the perpetrator may think it is morally right because of some delusion or irresistible impulse brought on presumably by some mental disease or defect.

With regard to the standard of review in federal habeas corpus cases as set forth in *Jackson v. Virginia*, ____ U.S. ____, 98 S.Ct. 2781 (1979), this writer regards due process as satisfied when the required number of jurors find on the basis of the evidence that it was sufficient to justify finding of proof beyond a reasonable doubt. While we refer to it as the "some evidence rule", regardless of what it is called it is, nevertheless, evidence sufficient in the jury's mind to justify in their hearts, minds and conscience the requisite degree of proof.

I otherwise concur in the majority opinion.

SUPREME COURT OF LOUISIANA

NO. 64,185

STATE OF LOUISIANA

Versus

JOHN DUFF ABERCROMBIE

APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT, PARISH OF CLAIBORNE, THE HONORABLE DAVID T. CALDWELL, JUDGE

On Application for Rehearing

Denied.

FWS
AT JR
WFM
JLD
FAB

Dixon and Calogero, J.J., would grant.

APPENDIX B

A. U.S. CONSTITUTIONAL PROVISIONS

1. Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness againt himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an imparial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. LOUISIANA CONSTITUTIONAL PROVISIONS

1. Article I, Section 2

§ 2. Due Process of Law

Section 2. No person shall be deprived of life, liberty, or property, except by due process of law.

2. Article I, Section 19

§ 19. Right to Judicial Review

Section 19. No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. This right may be intelligently waived. The cost of transcribing the record shall be paid as provided by law.

C. FEDERAL STATUTES

1. 28 U.S.C. § 1257

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

D. LOUISIANA STATUTES

1. La. R.S. 14:10

§ 10. Criminal intent

Criminal intent may be specific or general:

(1) Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act.

2. La. R.S. 14:14

§ 14. Insanity

If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility.

3. La. R.S. 14:30

§ 30. First degree murder

First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm.

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury. Amended by Acts 1975, N. 327, § 1; Acts 1976, No. 657, § 1.

4. La. R.S. 15:438

§ 438. Circumstantial evidence

The rule as to circumstanial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothsis of innocence.

5. La. R.S. 15:445

§ 445. Inference of intent; evidence of acts similar to that charged

In order to show intent, evidence is admissible of similar acts, independent of the act charged as a crime in the indictment, for though intent is a question of fact, it need not be

proven as a fact, it may be inferred from circumstances of the transaction.

6. La. R.S. 15:446

§ 446. Evidence where knowledge or intent is material and where offense is one of a system

When knowledge or intent forms an essential part of the inquiry, testimony may be offered of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent and where the offense is one of a system, evidence is admissible to prove the continuity of the offense, and the commission of similar offenses for the purpose of showing guilty knowledge and intent, but not to prove the offense charged.

7. La. C.Cr.P. Article 560

Art. 560. Change of plea of not guilty to guilty

A defendant may at any time withdraw a plea of not guilty and plead guilty, subject to the limitations stated in Articles 556 through 559.

8. La. C.Cr.P. Article 561

Art. 561. Change of plea of "not guilty" to "not guilty and not guilty by reason of insanity"

The defendant may withdraw a plea of "not guilty" and enter a plea of "not guilty and not guilty by reason of insanity," within ten days after arraignment. Thereafter, the court may, for good cause shown, allow such a change of plea at any time before the commencement of the trial.

9. La. C.Cr.P. Article 652

Art. 652. Burden of proof

The defendant has the burden of establishing the defense of insanity at the time of the offense by a preponderance of the evidence.

10. La. R.S. 33:1554

§ 1554. Conservator of the peace

The coroner shall be a conservator of the peace.

Supreme Court, U. S.
FILED
APR 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1092

JOHN DUFF ABERCROMBIE

Petitioner,

V.

STATE OF LOUISIANA

Respondent

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

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Assistant Attorney General
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO.

JOHN DUFF ABERCROMBIE
Petitioner,

V.

STATE OF LOUISIANA
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

II.
STATEMENT OF THE CASE

The facts in this matter as determined by the Louisiana Supreme Court are as follows.

On the night of October 21, 1976, Father Ted Lelieveld, a Catholic priest, was shot twice in the chest when he answered a knock at his front door. He died shortly thereafter.

There were no eyewitnesses to the shooting. The following day a .38 caliber pistol was found near the scene of the crime, but the police still had no suspects. They concentrated on investigating

several anti-Catholic incidents that had occurred in the surrounding area during the four preceding months.

A composite sketch was obtained from several witnesses to these prior acts of vandalism, assault, and battery. This composite reminded two policemen of a man they had stopped some weeks earlier. As a result the police visited the home of the defendant, where they saw three vehicles that matched descriptions given by the witnesses of the several prior incidents.

The police were admitted by the defendant's father. When they saw that the defendant matched the composite sketch, he was arrested for the prior acts of battery, assault, and criminal damage to property.

During the arrest the officers seized a box of .38 caliber shells and a cigarette pack with four .38 caliber shells. After obtaining a search warrant and searching further, some letters and tapes evidencing a strong antagonism towards the Catholic church were also seized.

Several days later the defendant was indicted for the first degree murder of Father Lelieveld.

The defendant was initially determined by a sanity commission to be incapable of standing trial. Eventually, however, he was found to be competent to stand trial, and he pleaded not guilty and not guilty by reason of insanity.

His motion for a change of venue and his motion to suppress the evidence seized at the time of his arrest were both denied. The trial court overruled the defendant's objection to a state pre-trial

Prieur motion to permit the admission of evidence concerning the prior acts of vandalism and potential violence.

At his trial the gun, the bullets, the letters and tapes, and the other crimes evidence were all introduced. Other than cross-examination, the only evidence introduced by the defense was psychiatric testimony to the effect that if he had committed the crime he could not tell right from wrong. On rebuttal, the local coroner testified that he thought the defendant had known right from wrong.

The jury returned a verdict of guilty. After a sentencing hearing, the defendant was sentenced to life imprisonment.

On appeal to the Louisiana Supreme Court, the defendant's conviction was affirmed on September 4, 1979. On October 8, 1979, defendant's application for rehearing was denied.

III.

Defendant petitioner raises four questions for this Honorable Court's consideration. The first question addresses the claim of the Defendant that his rights to due process under the Fourteenth Amendment were violated because the evidence presented against him was insufficient to constitute proof of guilt beyond a reasonable doubt as could be found by any rational trier of fact.

This issue was argued before the Louisiana Supreme Court. In disposing of Defendant's contentions, the Louisiana Supreme Court stated:

"We have discussed the evidence in this detail because the United States Supreme Court, in *Jackson v. Virginia*,_____U.S._____, 98 S.Ct. 2781 (1979), seems to hold a review of the sufficiency of the evidence to support a conviction than the 'some evidence' rule.

* * * *

The test mandated is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found . . . beyond a reasonable doubt' that the defendant is guilty. 99 S.Ct. 2789.

Applying this test, we have little difficulty in finding that the evidence overwhelmingly supports a determination that, due to the accused's severe paranoid schizophrenia, he was irresistibly compelled to accept the perceived direction of the higher beings whom he felt controlled him, by reason of which he did not know that it was *morally* wrong to kill the victim.

On the other hand, the expert evidence also admitted that the accused knew it was '*humanly* wrong', being illegal, to kill another human being."

In Louisiana, the question of legal insanity is for the Jury. In *State v. Rollins*, 351 So.2d 470, 472 (1977), the Louisiana Supreme Court stated:

> "With regard to the issue of insanity at the time of the offense: A defendant is persumed to be sane at that time. *State v. Marmillion*, 339 So.2d 788 (La. 1976). The defendant has the burden of establishing the defense of insanity at the time of the crime. La. C.Cr.P. art. 652; *State v. Craig*, 340 So.2d 191 (La. 1976). The determination of whether the defendant was insane at the time of the crime is a fact question reserved for the jury. *State v. Daigle*, 344 So.2d 1380 (La. 1977); *State v. Clark*, 305 So.2d 457 (La. 1974).

In a recent decision (March 3, 1980), the Louisiana Supreme Court, on rehearing, reversed itself and affirmed the conviction of a defendant involved in a shooting spree. *State v. Poree*, ____So.2d_____(1980), No. 68-308, 318. Poree had been charged with nine (9) counts of attempted murder and one (1) count of armed robbery after going on a shooting spree in New Orleans, Louisiana. At trial he pled not guilty and not guilty by reason of insanity. He was convicted and appealed his conviction to the Louisiana Supreme Court. On appeal the Louisiana Supreme Court reversed the conviction concluding that:

> ". . . the presumption of sanity which serves to shift the burden of proving insanity to defendant is a rebuttal presumption: upon the defendant's production of evidence of insanity, the presumption is destroyed, and if the defendant's evidence outweighs that of the State, the fact-finder must find him not guilty by reason of insanity."

On rehearing however, the Louisiana Supreme Court, Watson, J., for the majority stated:

> "We now find that the majority on original hearing erred in this conclusion."

* * *

"Applying these rules to the instant appeal, it is apparent that the question before us is whether there was any evidence before the jury on which it could reach the conclusion that the defendant had failed to prove his defense of insanity.

The Statutory law is clear:

'The defendant has the burden of establishing the defense of insanity at the time of the offense by a preponderance of the evidence.' "

* * *

"There is no question that the evidence of Poree's sanity, as reflected by the testimony of the psychiatrists and the lay witnesses, is weak. However, it is impossible to conclude that there is no evidence of sanity. It is also important to remember that every person is presumed to be sane. *State v. Chinn*, 229 La. 984, 87 So.2d 315 (1956).

* * *

The jury concluded that Poree had not borne his burden of establishing the defense of insanity."

The second question Petitioner Defendant presents to this Honorable Court for consideration is Defendant's claim that the admission of other crimes' evidence violated defendant's rights to a fair trial and due process under the Sixth and Fourteenth Amendments.

This issue was argued before the Louisiana Supreme Court. In disposing of defendant's contentions, the Louisiana Supreme Court stated:

"At a pre-trial hearing to determine the admissibility of these other crimes, the state argued that they were admissible to show intent, knowledge and motive. The trial judge ruled that the evidence was admissible.

* * *

In *State v. Prieur*, cited above, and its progeny, we have extensively delineated the scope of the three relevant statutory purposes for which other crimes evidence may be introduced. These three purposes are those set forth by the legislature in La. R.S. 15:445, 446 — to prove knowledge, intent, and system. (However, we have also had occasion to note other bases of independent relevancy, such as motive. *State v. Sutfield*, 354 So.2d 1334, 1336-37 (La. 1978).

* * *

In *State v. Sutfield*, 354 So.2d 1334, 1336-37, (La. 1978), we recognized that evidence of other crimes may be admissible if the evidence is relevant to show motive, i.e., to show that the defendant had a reason to commit the crime he is charged with. Motive is generally recognized as an independent basis of relevancy. See McCormick, Evidence, Section 190 at 450-54 (2d ed. 1972); 2 Weinstein and Berger, Weinstein's Evidence, Section 404 (09) at 404-53 (1979); Comment, Other Crimes Evidence in Louisiana, 33 La. L. Rev. 614, 617 (1973).

* * *

In addition, as with all evidence of other crimes that is independently relevant, other crimes evidence admitted to show motive must satisfy two tests: 1) there must be clear and convinc-

ing evidence that the defendant did indeed commit the other crimes, and 2) the probative value of the evidence must outweigh the risk of prejudice — the risk that the evidence will be used to convict the defendant because he is a man with a criminal disposition. *State v. Sutfield*, cited above, 354 So.2d 1334.

* * *

The existence of these two additional tests is necessitated by the rationale behind the general prohibition against evidence of other crimes, the fear that a defendant may be convicted because of a criminal disposition rather than actual guilt. In order to minimize the risk of prejudice, it must be clear (a) that the defendant committed the other crimes and (b) that their probative value exceeds the risk of prejudice to the defendant.

* * *

Applying the above principles, we hold that the testimony of Father Elson (1), Mrs. Wagner (2), and Mrs. Johnson (3), was properly admissible to prove motive. The defendant was charged with an apparently senseless killing, so any evidence tending to prove that the defendant had a motive or reason for committing this crime was extremely probative.

* * *

Since the evidence tended to prove a factually particular motive of great probative value in this case, the issue becomes whether the defendant's connexity with these other crimes was adequately established and whether the evidence's risk of prejudice outweighed its probative value.

However, the other three witnesses, Father Elson (1), Mrs. Wagner (2), and Mrs. Johnson (3), were able to identify unequivocably the defendant as the man they had seen. Therefore, their testimony was admissible, unless its probativeness was outweighed by the risk of prejudice.

In balancing probativeness versus prejudice it is important to remember the reason for the rule; it is designed to prevent the jury from improperly convicting the defendant simply because he is a bad man or has committed other crimes. In the instant case, a first-degree murder trial, there was very little risk that the jury's objectivity would be swayed by evidence that the defendant has punched someone and thrown a brick at him and that he had hit someone's hand and slapped a window."

State v. Prieur and *State v. Sutfield* are still valid law in Louisiana.

The third question Petitioner Defendant presents to this Honorable Court for consideration is the claim that Defendant's rights were violated because of the distinction between legal wrong and moral wrong drawn by the Louisiana Supreme Court. While this particular question was not specifically raised on appeal to the Louisiana Supreme Court, that Court disposed of this question by stating:

> "... that, due to the accused's severe paranoid schizophrenia, he was irresistibly compelled to accept the perceived direction of the higher beings whom he felt controlled him, by reason of which he did not know that it was *morally* wrong to kill the victim.

On the other hand, the expert evidence also admitted that the accused knew it was '*humanly* wrong', being illegal, to kill another human being.

The difficulty is that the M'Naughten test of *legal* insanity, i.e., being capable of distinguishing between right and wrong with regard to the conduct in question, is not in origin or application a medical or scientific concept ...

However, in the last analysis, it is rather a question of law than of medicine as to what the cognizable 'wrong' is; a legal rather than a medical question is presented by the issue of whether an accused is legally insane who knows it is *legally* wrong to kill another human being, but who does not know it is *morally* wrong (being under a delusion or compulsion produced by severe mental disease). Indeed, the predominant practice in American jurisdictions seems without discussion to leave it to the factual determination of the trial jury to determine whether the defendant was capable of knowing right from 'wrong' with regard to the conduct complained of, without specifying as a matter of law whether the defendant must know it to be 'morally' or instead 'legally' wrong. LaFave and Scott, *Criminal Law* 278-279 (1972). The jury is thus free to exculpate for legal insanity on either basis, providing that the inability to know is a product of a mental disease or defect.

As we apprehend our Louisiana jurisprudence, we have followed the latter practice in the application of the 'right - wrong' test of La. R.S. 14:14. Therefore, we have not disturbed jury findings of sanity when the instructions to the jury have permitted it to find the accused sane if the accused knows it is 'wrong' to

commit the offense, without specifying that he must know it is *either* 'legally' or 'morally' wrong. That is, we have not as a matter of law required that there by exculpation by reason of legal insanity where the accused does not know his act is *morally* wrong because of 'irresistible impulse' or some variation of this concept. *State v. Johanson*, 332 So.2d 270 (La. 1976); *State v. Berry*, 324 So.2d 822 (La. 1976); *State v. Plaisance*, 210 So.2d 323 (La. 1968); *State v. Bickham*, 121 So.2d 207 (La. 1960); *State v. Jenkins*, 107 So.2d 632 (1958). As these decisions illustrate, we have until now noted the strong arguments against the restricted standard of legal insanity thus represented, but have preferred to leave to legislative revision any clarification or improvement of the statutory test and its jurisprudential interpretations by this court.

We therefore do not find merit to this assignment."

The fourth question Defendant Petitioner presents for this Honorable Court's consideration is defendant's claim that his Fifth and Fourteenth Amendment rights were violated by the introduction of an inculpatory statement made to the Parish Coroner without the State giving notice to the Defendant of the State's intention to do so.

This issue was not raised at the State level by the Defendant therefore is not part of the record, and as such under the rules of this Honorable Court, will not be considered by this Court.

IV.
CONCLUSION

The Petition for Writ of Certiorari should be denied in this case because petitioner has failed to show that any Constitutional or legal right to which he is entitled has been abridged by any State statute or action. 28 USCA § 1257 (3).

Respectfully submitted:

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V.
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Petition for Writ of Certiorari has been served on the Petitioner by placing copies of same in the United States Mail, postage prepaid, addressed to:

Honorable M. Carl Rice
1020 Slattery Building
Shreveport, Louisiana 71101

Honorable Stephen Russell Burke &
James D. Slack
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The parties required to be served have been served, this 17th day of April, 1980.

Patrick G. Quinlan
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